United States Court of Appeals
for the Second Circuit

APPENDIX

77-7037

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In The

United States Court of Appeals

For The Second Circuit

NATIONAL AUTO BROKERS CORP., et al.,
Plaintiffs-Appellants,

-against-

GENERAL MOTORS CORPORATION, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

JOINT APPENDIX - VOLUME 14

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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(In open court)

THE COURT: I made a mistake in ruling on page 3 to 55 of the deposition. It is admissible because Bob Bain Chevrolet is a defendant here, so any conversations over statements that are testified to by Bob Bain -- Mr. Arnold testifies that Mr. Bain said this or that -- why, that's admissible against the defendant Bob Bain Chevrolet.

Again, you must be cautious that this evidence if admissible may be admissible against Bain but there is no indication, in fact, there is a positive indication to the contrary, as far as anyone from General Motors being present; so the evidence really does not bind or is not admissible as far as General Motors until and unless some logical connection is made.

You can't consider it against General Motors until a logical connection is made and there is nothing on the face of it to so connect it to General Motors because they were not present.

MR. PERSON: Page 53, lines 11 through 23:

"Q Have you ever heard Mr. Bain discuss Nabcor?

"A Yes.

"Q About how many times?

"A Once that I remember.

"Q And when was that?

"A Following Monday morning at a sales meeting.

"Mr. Kaplan: Excuse me. Did Bain on the occasion you're about to describe discuss Nabcor by name, or did he discuss Strimple, or did he discuss General Auto Sales, or what?

"The Witness: My best memory on it, he discussed Strimple, because everybody knew Strimple.

"Mr. Kaplan: And did he mention the name Nabcor on this occasion?

"The Witness: He could have.

"Mr. Kaplan: Do you remember?

"The Witness: No.

"Mr.Kaplan: Thank you.

"Mr. Person; When was the occasion?

"The Witness: Following Monday after he refused to sell him cars.

"By Mr. Person:

"Q Who was there in the presence of Mr. Bain?

"A The whole sales staff.

"Q Consisting of how many people?

"A Must have been about 16.

"Q Was Bob English there?

"A Not to my knowledge.

"Q Was any people there --

"A I don't think there was people --

"Q -- from GM?

"A -- there from GM.

"Q And what did Mr. Bain say?"

Page 55, 1 through 19:

"A That he wouldn't sell cars to Strimple.

"Q Did he give any reasons?

"A He didn't want to make him a direct competitor to the dealership.

"Q Did you know each of the persons there at the meeting?

"A Yes, I did.

"Q Was anyone there who was not an employee of Bob Bain Chevrolet?

"A To my knowledge, everybody was employed by Bob Bain Chevrolet.

"Q Did Mr. Bain indicate that he had --

"Mr. Kaplan: Objection.

"Mr. Person: Did Mr. Bain say anything else?

"Mr. Kaplan: On this subject, I presume?

"Mr. Person: Yes.

"The Witness: I firmly believe he said that he was going to talk to the other Chevy dealers or the zone office about the matter."

Page 81, lines --

MR. KAPLAN: If your Honor please, I have an objection to the whole portion at 81 to 86 and 87 to 90.

THE COURT: That's the next one you want to read?

MR. PERSON: Yes.

(Pause)

THE COURT: I think this is irrelevant. Do you want to come up? I'll hear you.

(At the side bar)

THE COURT: What is the relevance? I'm talking about line 16 of page 81 over to line 23 of page 86, which is really the last, the end of the page.

MR. PERSON: It shows that Bob Bain was under close supervision by the factory, by General Motors, in that he even had personnel on the premises in order to give authority to do warranty work, which is not something that's customarily done.

THE COURT: It's explained here there

was an attempt to get the warranty work under some control as far as the cost of the warranty work. There is not the slightest indication here that this has anything to do with the conspiracy. It's the first time I have ever heard any suggestion or any evidence suggesting that factory people, there to worry about the validity of the warranty claims, had anything to do with this conspiracy. I'll sustain the objection.

MR. PERSON: When you take that in connection with the ownership of the dealership, and now they had personnel there --

THE COURT: They have a right to control the warranty work. General Motors is paying for the warranty work in effect. I think they should have people on the premises.

My point is that there is nothing except pure speculation and imagination that would suggest that this has anything to do with the conspiracy. I'm sustaining the objection.

Is there anything else in this deposition?

MR. KAPLAN: The balance which we have objected to, your Honor.

THE COURT: While we're here, let's look at that.

(Pause)

THE COURT: I would sustain an objection. It's meaningless. It has nothing to do with the conspiracy.

MR. PERSON: It shows that the business of this dealership was under supervision from General Motors; in other words, that this may be part of the reason that a jury could infer that Bob Bain was unwilling --

THE COURT: A jury, as far as I know, is not supposed to be turned loose to speculate about a lot of things that are not tied in. You have not tied this in in any way. I think that the jury should not be given a lot of things that would involve nothing but sheer speculation. I'll sustain the objection.

(In open court)

MR. PERSON: I call Mr. Young.

ALFRED J. YOUNG, SR., called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PERSON:

Q Mr. Young, you are a plaintiff in this

Q On or after September 1970 when you acquired your second franchise from Nabcor, did you attempt to put on any franchisees?

A Yes. I had a more strenuous effort to obtain them but I did not.

Q What did you do to attempt to put on franchisees?

THE COURT: What period of time?

Q From the beginning to the end, through the end of 1970.

A Personal interviews with individuals I knew; operators of gasoline stations, newspaper ads, and letters, and some telephone calls. The newspaper ads were throughout the northern New York area, North of Syracuse.

Q Did you experience any delays in getting any automobiles from General Auto Sales?

A One in 1969.

Q Was there any consideration to you financially which resulted from that?

A Yes.

Q Could you state what that was?

A It involved a customer that had bought one automobile I think in Spril of 1969. A month later he returned for a second auto which he wanted as soon as possible. I attempted to get it through General Auto Sales & Leasing. Apparently the customer becamse impatient and then cancelled the order, made a statement to the effect --

MR. KAPLAN: Objection. I object to the customer's statement.

THE COURT: Read that back.

(Record read)

MR. PERSON: I will drop that, your Honor.

Q Did any legal actions result?

A Yes.

Q In connection with that did you seek any assistance from anybody?

A I seeked assistance from the bank involved and from Nabcor.

Q Were you a defendant in the action?

A Yes.

Q Did you describe the action to anyone at Nabcor?

A Yes, I did.

Q Did you request help from Nabcor?

A Any help possible, right.

Q Were you able to get any help from Nabcor?

A I was not successful. Nabcor was involved --

Q Was this something told to you?

A Yes.

Q Whom were you speaking to?

A Mr. Maiorana, Frank Maiorana.

THE COURT: What did you ask for? You asked to have Nabcor defend the action?

THE WITNESS: I asked for Nabcor's assistance in the problem.

THE COURT: Did you get any assistance?

THE WITNESS: I was not successful in getting assistance. I attempted to.

THE COURT: I'm not clear. What assistance did you ask for? Just anything they could do for you? Was it put in those terms?

THE WITNESS: It was put in those terms because all of the automobiles that I had on my lot had been seized.

THE COURT: You had a lot?

THE WITNESS: An automobile lot. These were all used cars that had been taken in trade on new cars that had been sold.

THE COURT: They were seized as part of

this lawsuit?

THE WITNESS: They were seized.

Q Did you win or lose the lawsuit?

A It was lost. It didn't turn out to be a court action. It was settled out of court. I agreed to return the customer's money but the customer had demanded more money from me than I had gotten from him. That was the reason for the objection on my part, so I ended up paying him much more than I got from him.

THE COURT: He gave you a deposit; is that right?

THE WITNESS: Yes. He signed over his old car as a trade-in, which was sold, and I thought that's all I owed him if it was cancelled.

THE COURT: What did you sell it for?

A The list price of the new car that he ordered plus sheriff's fees and interest.

Q At the conclusion of this, did you have any working capital remaining in the business?

A No working capital after that incident.

Q Did you resort to any courts in connection with your financial status?

A Legal courts?

Q Did you go into bankruptcy?

A In the end.

Q When was that?

A Bankruptcy was filed in 1971.

Q How much did you pay for your franchise?

A $5000.

Q Through 1970 did you put any additional money into the business?

A The total put into the business was approximaely $20,000.

Q Is that including the 5000 or not?

A Yes, it is.

Q Was that in cash?

A Cash, bank loans, house mortgages, personal loans.

Q By the end of 1970 how much of the money you put in was left?

A Approximately $6000, but I had no control of it because the cars were still in the possession of the sheriff and the bank.

Q Did you have any obligations at the same time?

A Yes.

Q How much?

A $177 payment to the bank.

Q Was thata monthly payment?

A Yes.

Q That was in connection with --

A A loan.

Q Was that loan included within the $15,000?

A Yes. The 15,000 was a bank loan, small business administration.

Q In September 1970 you said you changed from General to Nabcor. Did you place any orders in 1970 to Nabcor for any automobiles?

A Yes. I think I ordered approximately five.

Q Can you recall what happened?

A Only one of those was filled, one of those orders.

Q Orders for what type of cars?

A The five cars were one Cadillac, one Chrysler, I think two Buicks, and I can't recall the last one.

Q Do you recall what car you received?

A Pontiac.

THE COURT: One was a Pontiac. That would have been the fifth car?

THE WITNESS: Yes.

Q Were you employed in this as a full-time business?

A Yes.

Q For how long?

A During the entire period through 1970 from about the fall of '67 after he was released from the service.

Q Do you recall how much you earned from your business during that period?

A Are you referring to profits or just gross sales?

Q Taking any money out of the business.

A I can't recall.

Q Either in the form of salary --

A I didn't take a salary out. It was put right back into the business in the form of stock and used cars and equipment.

MR. PERSON: No further questions.

CROSS-EXAMINATION

BY MR. KAPLAN:

Q Mr. Young, from sometime in 1968 to sometime in 1969 you operated a Texaco service station, true?

A Yes.

Q You workedat that part of the time?

A That was in connection with the automobile buisness.

Q You sold gasoline, true?

A Some.

Q You repaired automobiles?

A Very little.

Q You were a lessee of Texaco with that service station?

A It was not a formal lease. I had to agree to pay them X number of dollars for gasoline.

Q Texaco?

A Yes. The Texaco representatives.

Q You said that including ghe $5000 you paid for you Nabcor franchise you put a total of $20,000 into the business. Was $15,000 of that total a loan you obtained from the Small Business Administration?

A Yes, it was.

Q One of the purposes of that loan was to enable you to lease the Texaco station, true?

A Yes.

Q Before you actually bought your Nabcor franchise, the first one, on May 26, 1967, you had a meeting with Frank Maiorana, true?

A Yes.

Q There was some discussion at a meeting as to where Nabcor got its cars, true?

A Yes.

Q On that occasion when you met with Frank Maiorana he told you that Nabcor's sources of supply were franchised automobile dealers, true?

A I don't recall if it was franchised automobile dealers; it was something to that effect.

Q You understood it was car dealers as opposed to the manufacturer, true?

A Yes. It was not the manufacturer?

Q On the occasion when you met him, Mr. Maiorana told you Nabcor could supply the cars that its brokers ordered?

A Yes.

Q In fact, sir, he guaranteed you that Nabcor could supply the cars, right?

A I think he did to that effect. He convinced me. He stated it in that term. I was convinced we could get the cars if we got involved.

Q He used the term guarantee, did he not?

A I don't recall whether he guaranteed it.

Q In any event, sir, in May of 1967, before you bought your first Nabcor franchise Mr. Maiorana didn't tell you that Nabcor had had any trouble getting cars, true?

A I think he mentioned he might have had some difficulty, but I don't recall.

Q I'll read to you from your deposition which was conducted on April 11, 1973 at page 77:

"Q Did Mr. Maiorana indicate that Nabcor had any difficulty in obtaining cars from these sources?

"A No. He didn't to me."

After you bought the first Nabcor franchise in May of 1967, Mr. Young, you then started ordering from Mr. Strimple and Mr. Strimple alone, is that right?

A From General Auto Sales & Leasing.

Q That was the only place you attempted to get cars from?

A That's true.

Q You never attempted to get automobiles from regular franchised dealers, true?

A Repeat the period.

Q Take the whole period from when you first became a Nabcor broker to the end of 1970. You never attempted to get cars from franchised dealers for your Nabcor business, is that right?

A Not for the Nabcor business, no.

Q As long as General Auto Sales or Mr. Strimple was your distributor you got every car you ever ordered from him, true?

A Except one.

Q Is that the one you referred to a moment ago about the lawsuit?

A Yes.

Q You got all the cars you ordered from Mr. Strimple within a normal delivery time, true?

A September 3.

Q I read to you again from your deposition of April 11, 1973, at page 178:

"Q Had you experienced any problems with respect to delivery at that time?

"A I personally -- well, let's pit it this way: Every car I ordered from General Auto I received with a normal delivery time while I was -- while I purchased from him."

Now, sir, you referred to this transaction in which indeed there was a lawsuit. The customer's name in that case was James T. Morris?

A Right.

Q On or about May 27, 1969, he ordered a 1969 Chevrolet, true?

A True.

Q And then at the end of June of 1969 Mr. Strimple told you that he cannot get that particular model, true?

A About that time.

Q That was at the end of the model year, true?

A Right.

Q You arranged with this Mr. Morris for him to take a 1970 Chevrolet instead of the 1969 he had ordered, true?

A I attempted to do that. I thought I had done that.

Q As far as you were concerned you made that arrangement with him, right?

A Right.

Q He denied that?

A He denied it later.

Q In any event, when this dispute arose there was nobody making 1969 Chevrolets any more, is that right?

A I don't think so.

Q That's the one car you claim you didn't get while General Auto Sales was your distributor?

A Right.

Q You didn't go into bankruptcy for at least two years after that incident, right?

A Approximately two years, but as a direct result of it.

MR. KAPLAN: I move to strike the last as unresponsive.

THE COURT: I'll let it stand.

Q Mr. Young, you mentioned that after Nabcor became your source of cars in September of 1970 you ordered five more automobiles by the end of 1970. Could you be mistaken as to how many you ordered by the end of 1970 and how many you ordered after the end of 1970?

A I could be but I don't think so.

MR. KAPLAN: At this time I offer Defendants' Exhibit Z7, which is a compilation of the orders for GM cars which are reflected as having been submitted by Mr. Young to Nabcor per Plaintiffs' Exhibit 450, the Nabcor order log, up to December 10, 1970.

THE COURT: Is that all right?

MR. PERSON: I want to make a comparison.

(Pause)

THE COURT: Was he specifically asked by Mr. Person about orders placed with Nabcor between September and the end of the year?

MR. KAPLAN: That's the way I understand that.

THE COURT: Did you understand that to be the question?

THE WITNESS: From Mr. Person? I did.

THE COURT: Your testimony is that the five orders were placed between September 1970 and the end of 1970?

THE WITNESS: As far as I can recall.

MR. PERSON: No objection.

(Defendants' Exhibit Z7 was received in evidence) xx

(Mr. Kaplan read to the jury from Defendants' Exhibit Z7 in evidence)

Q In September of 1970, Mr. Young, you went down to Nabcor's office in Philadelphia; is that right?

A Right.

Q You had some discussion about becoming a master broker for Nabcor on that occasion with Frank Maiorana, true?

A True.

Q On tnat tripo to Philadelphia in September of 1970, when you talked about becoming a master broker, Mr. Maiorana didn't tell you that Nabcor had had any problems getting automobiles, true?

A I can't recall, sir.

Q From your deposition at page 196:

"Q Did they indicate to you at that time that they were having any problems obtaining cars to fill orders placed by master brokers orbrokers or area brokers?

"A At that time they didn't."

Up until the time when you went to Philadelphia in Sepgember of 1970, Mr. Young, General Auto Sales had been a master broker covering upstate New York including Watertown?

A Yes.

Q And then in September of 1970 you became a master broker and your territory included part of the territory which previously had been General Auto Sales, true?

A I don't think that General Auto Sales had any territories of Rochester. That's where I was. The only thing they had was Young Auto Sales, a broker.

Q The territory you were in prior to September of 1970 had been Mr. Strimple's before that time, right?

A If you are talking about what involved myself? Yes.

Q And then you acquired that territory as a master broker yourself?

A I guess so.

Q Before you acquired that territory and became a master broker, did Nabcor or Mr. Strimple tell you that General Auto Sales had gone out of business?

A No. I didn't know that.

Q They just asked you for $7000 more than you had paid for the master broker franchise, true?

A I don't know if it's true.

Q But you paid them some more money?

A Yes.

Q They didn't tell you they were having grouble getting his car and they didn't tell you Strimple went out of business up to the point where you paid them the money?

MR. PERSON: Have you answered thatyou paid more money? I didn't hear an answer.

MR. KAPLAN: I thought he did.

THE COURT: We entered into an agreement to pay more money.

Q Did you in fact pay more money?

A I don't think any more money was ever paid. That was the end of 1970 and it was just about the end of the business period.

Q Up to the time you agreed to pay more money for the master broker franchise they didn't tell you that Strimple had gone out of business, right?

A I don't think I knew it.

Q And they didn't tell you they were having trouble getting cars, true?

A That I'm not sure of.

Q Page 196 of the deposition:

"Q Did they indicate to you at that time that they were having any problem obtaining cars to fill orders placed by master brokers or brokers or area brokers?

"A At that time they didn't."

Mr. Young, you said you were not successful in selling any franchises. In fact, sir, you don't have any idea as to why that was so; isn't that right?

A I have some idea why it was so.

Q From your deposition at page 196:

"Q As a master broker, Mr. Young, did you attempt to sell any franchises?

"A Yes.

"Q And were you successful?

"A No.

"Q Is there any reason you know why you were not successful?

"A No, I don't know."

No further questions.

REDIRECT EXAMINATION

BY MR. PERSON:

Q Did you want to answer that question about why you were not able to sell franchises?

MR. KAPLAN: I object to that. I asked him if he had any idea. His prior testimony was thathe had no idea.

Q Do you have anything to add to that testimony?

MR. KAPLAN: I object to that.

THE COURT: This is time for a recess.

Ladies and gentlemen, you may step out.

I'll hold the lawyers for a moment.

(Jury out)

EXAMINATION

BY THE COURT:

Q What would you say as to your present idea as to why you were unsuccessful in selling franchises?

records?

MR. PERSON: We have asked him for many records over the years.

THE COURT: Do you have any records giving names of people that were interviewed for franchises?

MR. PERSON: Not that I can recall.

THE COURT: What do you contend here is admissible evidence?

MR. PERSON: In connection with the inability to sell the franchises?

THE COURT: That is what we are talking about.

MR. PERSON: I am contending that his relationship with Nabcor is as a franchisee was dependent on Nabcor's ability to give him support services as a franchisor and that the crippling of the franchisor by the antitrust activities if they are such --

THE COURT: I am asking you what -- he gave me a description of what he would testify to along this line. I don't know whether I carried it to the bitter end, but I am asking you what of this evidence or any other evidence that you know he would give, what is it that would be admissible?

You heard him describe, first of all, that he interviewed approximately eight people. I don't

THE COURT: What do you propose to ask him? Do you have anything further?

MR. PERSON: Yes. Just to clarify the SBA loan and the use of the proceeds between this gas station and the --

THE COURT: All right.

MR. PERSON: The reason is that even if there was any kind of local conspiracy up there which we haven't really gone into, it doesn't really assist us that much.

THE COURT: I think that is right.

(In open court.)

REDIRECT EXAMINATION

BY MR. PERSON:

Q Mr. Young, you testified that youhad taken out anSBA loan and that part of the proceeds of it or the proceeds of the loan were used to some extent in this gas station business.

What was the amount of the loan, first of all, the SBA loan?

A $15,000.

Q And how much of that was used in this gas station business?

A Approximately $4000.

Q Where was the rest of the money used?

A In the car business, the used car business. Used cars traded in on the new cars that went into stock.

Q Did the gas station business have any relationship with your Nabcor business?

A It is part of it.

Q Was the used car business -- did it have any relationship with your Nabcor business?

A That was part of the new car business.

MR. PERSON: No further questions.

MR. KAPLAN: I have no further questions.

THE COURT: All right, you are excused.

(Witness excused.)

$85:MR. PERSON: I have a deposition of Mr. Rock, John Rock.

MR. KAPLAN: I have an extra, if your Honor would like it.

THE COURT: Yes, please.

MR. PERSON: This is a deposition of Mr. John Rock, which was conducted back on September 30, 1974.

There will be times throughout the deposition when the question or answer comes to an abrupt end and tion.

MR. PERSON: My copy came from you.

THE COURT: All right.

MR. PERSON: Page 6,line 2:

"Q How were you made aware of Nabcor?

"A Through trade papers.

"Q Any other means?

"A Not that I recall.

"Q What was the nature of your conversation with Mr. Karney concerning Nabcor at that time?

"A The piece of paper, as I recall, came across my desk when the company was offering franchises for sale of automobiles and I knew that Nelson Karney had been involved, when he was in the East, as the fleet section representative and probably knew about Nabcor, and I asked him what the current situation on Nabcor as regards to their fleet certificate request.

"Q For what reason would the fleet people be concerned with a company reselling automobiles?

"A Basically we were not concerned with them.

"Q In other words, that this had no relevance to the fleet area?

"A Not as far as the staff marketing function of the Fleet Section goes, which was to create policies for General Motors to keep GM competitive in the fleet market.

"Q Could you tell me what Mr. Karney said to you during this conversation?

"A I don't recall the specifics of the conversation, just generally that he had explained the requirements for fleet certificate and nothing to his knowledge at that time had transpired on the certificate.

"Q I am sorry, could you repeat that, please?

"A I don't recall any specifics of the conversation with Mr. Karney other than the fact that the certificate per se had not been processed.

"Q Did he say that the certificate had not been processed or that the certificate had been processed but that the application denied?

"A I don't recall.

"Q You don't know whether Nabcor had been issued a fleet certificate or not?

"A That is correct.

"Q What was your title during this period?

"A Manager, Rental, Leasing & Commercial Sales.

"Q You had mentioned Detroit earlier when you described the position?

"A Yes, located in the General Motors Building in Detroit."

Page 8, lines 3 through 8 and 14 through 19:

"A Office was in the GM Building in Detroit.

"Q Mr. Karney's office was located there as well, is that correct?

"A Yes, we shared the office.

"Q Was he working under you?

"A Yes, sir.

"Q How long did he work under you?

"A I was his immediate supervisor until July 1st, 1969.

"Q And when did you become his supervisor?

"A August 1st, 1968."

Page 12, lines 12 through 16:

"Q Why did you select Nabcor as the company whose file, if any, this document was to be put in?

"A Because it's the only company that came to my mind that was in the business of offering franchises for the sale of automobiles, so I just put it in the Nabcor file."

Page 13 --

MR. KAPLAN: Before you go on, line 20 of page 12:

"Q Do you know if a file was created when this document was turned over to the File Department?"

Page 13, line 1:

"Q Let me ask then if you have ever seen any Nabcor file in your department after the time at which you first saw Plaintiff's Exhibit 1?

"A No, sir."

THE COURT: Resume, Mr. Person.

MR. PERSON: Page 13, line 5:

"Q Where are applications for a fleet certificate kept, or where were they kept during this same period?

"Mr. Kleinbard: By the same period we are referring to August 1, 1968, through July 1, 1969?

"Mr. Person: Right.

"A They would be kept in two places in the Fleet Section. If the request was originated in a field office, there would be a copy or a file set-up in the field office and then there would be a file in the Fleet Section office as well."

I think to be helpful the Fleet Section office is in Detroit. In case there are problems there are regional offices in other areas of the country.

MR. KAPLAN: So stipulated.

MR. PERSON: "Q Now, could you tell me how many Fleet Section offices there would be for General Motors nationwide during this period?"

MR. KAPLAN: I will stipulate there were seven, your Honor.

MR. PERSON: Plus the one in Detroit?

MR. KAPLAN: It wasn't a regional office.

THE COURT: All right.

MR. PERSON: There was one in New York and Philadelphia?

MR. KAPLAN: Yes, sir.

MR. PERSON: Page 14, line 8:

"A Each division has its own Fleet Department located in its home office city. That's the operational aspect of fleet. The Fleet Section is really the staff function for fleet.

"Q So that the Fleet Section has the main office which was in Detroit and that's the office in which you were located during that period?

"A Yes.

"Q And this main fleet office had seven field offices which were located in these seven cities which you mentioned? Who was the chief of the main fleet office in Detroit during that period August 1, 1968, to July 1, "Rock 1969?

"A R. L. Berg was Director.

2 "Q And who was immediately under him during that period?

"A Myself as manager of Rental, Leasing & Commercial Sales.

MR. PERSON: 15, 1 to 24:

"Q What other persons were at the same level as you at that time, in different staff functions?

"A For the Fleet Section?

"Q Yes.

"A I would say a fellow named Mort Price was in charge of the government. A fellow named Chet Clum --"

Then there's two people named here which I won't include.

"Q Mr. Karney at that time would be considered third line if he worked under you and under Mr. Berg, is that correct?

"A Yes, sir.

"Q Do you recall the name of the GM employee in charge of the New York field office during this period?

"A Bob DeSimone replaced Nelson Karney, so, yes, it would be Bob DeSimone.

"Q And Mr. Nelson Karney was his immediate predecessor in that position?

"A Yes, sir."

MR. PERSON: 18, lines 23 to 25.

"Q Do you know of any leasing companies who were qualified leasing companies which were reselling automobiles?

"A No, sir."

MR. PERSON: 19, 10 through the end.

"Q Can you identify what personnel of General Motors would be the appropriate persons to whom complaints about leasing companies reselling cars would go during the period of August?

"Mr. Kleinbard: Appropriate and proper is the same problem. You have asked him whether he got any such complaints and he said no.

"Q Do you know of any other person to whom complaints would ordinarily go, if any complaints in fact were made?

"A Well, there's a multitude of people who could field those type of complaints starting right with the district managers day after day all the way up through their supervisors and up to the divisional fleet department.

"Q How many divisional fleet departments are there, say for Buick?"

Page 20, line 1:

"A Well, by divisional I mean Buick.

"Q You mean Buick, I see.

"A By divisions I am talking about the car divisions, Oldsmobile, Buick, Cadillac, Pontiac, GMC trucks.

"Q And where would the Buick division, for example, turn any such unresolved problem over to?

"A Again, that could go various and sundry ways. They could carry it through the fleet section, if they wanted to. I assume they could take it to the general manager who could take it up to line of reporting. There is no, you know, no set way of handling any specific marketing problems. It depends on the nature of it, where it originated, who originated it.

"Q Was there any policy of General Motors during the period August 1, '68 through December 31, '73, concerning qualified leasing companies reselling new automobiles?

"A No, I don't recall any specific policy.

"Q Do you know of any prohibition contained in any agreements with dealers or leasing company?

"A No."

THE COURT: Is this all necessary.

MR. PERSON: I didn't mean to read this.

THE COURT: It seems to me that we have an awfully long deposition. If we just get endless detail about the organization and so forth as we had, I don't know that it's going to help us.

MR. PERSON: 22 on line 14 through the end.

"Q Is there any difference in a car sold as a stock sale,as a retail sale or as a fleet sale? Is there any difference thatone can detect upon examination of a car that is sold in any one ofthose three ways?

"Mr. Kleinbard: You mean in the physical car itself?

"Q Yes, is there any difference itself in the car?

"Mr. Kleinbard: You mean does it have four wheels, that kind of thing?

"Q Yes. Can any expert from the factory, other than looking up serial numbers and --"

THE COURT: What we are going to end up is him saying: No. There physically is no difference except leasing companies of their own specifications for cars, but if a retail purchaser wanted those specifications probably he could get.

I don't know what this is doing for us.

Do you have another witness? Maybe you

can review this deposition over lunch and cut it down.

MR. PERSON: I don't have another witness.

THE COURT: Who is the next witness after this deposition?

MR. PERSON: I have a couple of additional depositions.

THE COURT: We have one live witness today?

MR. PERSON: Yes and tomorrow I want to go into the damages.

THE COURT: It seems to me there is a tremendously excessive amount of detail so far and we have only gotten through page 22 minus the missing page which might have had something interesting.

Let's go.

MR. PERSON: This is at 24, line 12:

"Q Can you tell me when the fleet department in its present form was started?

"Mr. Kleinbard: Why don't you ask him during what period of time General Motors had a fleet section, if he's able to answer it?

"Q Okay. Could you answer that, please?

"A General Motors has had a fleet activity since the middle twenties, but with the divisional fleet departments and any overlying staff function."

THE COURT: We don't have to hear about the 1920s.

I'll ask the jury to retire. We'll meet again at 2:15.

(Jury out)

THE COURT: I am sure as I am sitting here that you could go into a tremendous lot of detail about the organization of GM, about various phases of things that relate to the so-called fleets. There was this sort of staff function within General Motors that had to do with the issuance of fleet certificates; there were obviously different functions in the divisions that had to do with fleet sales, and there is business of the fleet allotment.

At least we have had some reference to that. Maybe there were different names, not using the right names, and there were these fleet allowances, but I have not heard anything so far that tells me where we are getting in this deposition.

What is it he's going to testify to that has a relation to this case?

MR. PERSON: He's going to testify to the fleet certificate, the fleet allotment, the method of ordering automobiles.

THE COURT: Anything that we need to know? What is it that he's going to say about these things that we need to know in this case?

MR. PERSON: Well, it's a question of the manner in which the production capacity is set aside --

THE COURT: What does he say about it? You are giving me subjects. What does he say that you are going to use to argue to the jury or to me something relating to this case?

MR. PERSON: That each division has the authority to set its own policy as to distribution in the fleet allotment.

THE COURT: That doesn't add anything to our case.

What else does he say?

MR. PERSON: The purpose of the fleet allotment --

THE COURT: What does he say about the purpose?

MR. PERSON: The purpose is to allow dealers to be able to increase their supply of automobiles when it comes to supplying cars to the persons who are fleet users.

THE COURT: In other words, he's saying that the fleet certificate has a relation to the allotment.

MR. PERSON: He doesn't --

THE COURT: I thought that's what you told me.

MR. PERSON: I didn't mean that.

THE COURT: Were you talking just now about the fleet certificate or fleet allotment?

MR. PERSON: Allotment. He states that the fleet certificate is a means of trying to identify the persons who the company can -- the market as they envision the market for fleet seller, to identify those people.

THE COURT: Haven't we had that so far or was that on the preliminary hearing?

MR. PERSON: Preliminary hearing.

THE COURT: That was testimony from a General Motors witness. Was that Mr. Karney?

MR. PERSON: I believe it was.

THE COURT: I don't think there is any controversy about it.

We have had either at the preliminary hearing or here some testimony which certainly General

Motors doesn't controvert because it comes out of their own witnesses, and that is that the fleet certificate was a kind of sales device in the sense you just mentioned, that it would kind of identify to the different sales people in the divisions customers who might be prospects for buying fleets or large numbers of cars, and maybe it was something in their pocket that made them feel good or something like that, but as far as entitling them to any special benefits, the only benefits I recall being referred to are that possibly by showing a fleet certificate you could get, if you had people of your own like Hertz and Avis that were going to try to repair cars, you might get them trained at a General Motors facility and you might get some literature.

I think there was possibly some reference at one point to a possibility of getting a priority as far as repairs at dealers, but then that may have been withdrawn.

Anyway, we don't have to have lots of questions and answers read to establish the features and characteristics of the fleet certificate. If I am able to sit here and recite it, even 90 per cent of it, I think it probably can be stipulated.

What else do you want to glean from this deposition?

(Pause)

THE COURT: Talk over lunch and try to eliminate this deposition. I think it's probably a lot of general procedures that can be stipulated.

Mr. Kaplan, are you familiar with the deposition?

MR. KAPLAN: I think there are probably six or seven pages that would put in whatever is necessary to put in.

THE COURT: That would be a lot better than 100.

The thing is, we just do not want to waste time here and if we can get on to putting on whatever witnesses have to be put on to clean up other points -- what are the other depositions you want to read?

MR. PERSON: Mr. Berg and Mr. Olsen were also in the fleet department. I wanted to be able to put together the story of the fleet certificate from those three people.

THE COURT: You can put the story of the fleet certificate together as far as it relates to this case without reading pages and pages and pages of depositions. General procedures can be stipulated. I have not seen any inclination on the part of General Motors' counsel to withhold information about their procedures or to refuse to stipulate fairly on such procedures; nor have I ever heard anything from you telling me that General Motors will not stipulate to something that is true about general procedures.

If it comes to specific transactions regarding Nabcor, if Berg and whatever this other man is, if they had any specific transactions, then certainly they can have their depositions read, but general procedures. We do not have to have that. There is no credibility problem.

We do not have to have that. There is no credibility problem. There is no issue of fact. There are issues of law as to what conclusions are to be drawn from what I have to assume are undisputed facts.

As far as general procedure, you work out a stipulation. I'm not going to hear deposition testimony droning on and on about that stuff. The only thing as far as I know that we need any deposition testimony on is if these people have anything relevant to say about Nabcor specifically or any phase of its organization.

I want to add a word about Colonial Cadillac. My law clerk and I checked our notes, although we didn't actually look at the transcript, but our notes reflect that early in the testimony of Mr. Maiorana you started to ask him, Mr. Person, about Colonial, and that must be the first or second day of the trial.

It would have been at the very end of the first day, I think, when Frank Maiorana testified. I guess that was the first day of the trial. We had the jury selection and the openings and then Mr. Maiorana got on the stand.

He started to testify. Exhibit 18 was received. Then we had a discussion about the problems arising from possible hearsay testimony in this action before the jury about discussions Frank Maiorana is supposed to have had with 30 dealers or something like that.

I asked that Mr. Person limit himself, at least for the present, to the dealers that had been described in the opening statement, at least try to follow that. That was a fairly clear narrative of events.

AFTERNOON SESSION

2.30 P.M.

(Jury present.)

MR. PERSON: Page 27 of the transcript of John Rock, lines 5 to 16:

"Q Do the divisional fleet sections have any authority to establish policy relating to fleets during the period August 1, 1968, through December, 1973?

"A Certainly, yes.

"Q Could you tell me what authority they had to establish fleet policy during that period?

"A Each division sets its own policy as to distribution. That's the biggest example.

"Q Can you tell me what you mean as to distribution?

"A It's customary in the fleet industry to designate portions of the production capacity for the fleet market for dealers who conclude transactions with this market so that they can promise delivery within reasonable time periods.

"Q Does that mean a delivery schedule which is faster than the delivery schedules for typical retail orders?

"A No, what that means, is that if a dealer were to conclude a transaction for a hundred units and say normally based on his historical performance or sales pattern, that that hundred units would not leave him any units to sell for retail, in other words, it's a system where you can kind of run some lumps through the channel, so to speak."

Page 32, line 14:

MR. KAPLAN: Before that I would read one intervening question. Page 29, line 7:

"Q Can you recall the first time that a fleet certificate was required by General Motors to allow a person to submit orders that would be designated fleet orders?

"A That's never been a requirement."

THE COURT: May I hear that last question and answer, please?

(Record read.)

MR. PERSON: Page 32, line 14:

"Q So that all sales then made to dealers including divisions of GM are considered wholesale orders by General Motors?

"A Yes, all sales from the factory to dealers are referred to as wholesale sales.

"Q Now, can you tell me what the concept of a fleet sale is?

"A The concept of a fleet sale is a sale from a dealer to a fleet user.

"Q Does General Motors place any restrictions upon the ability of a dealer to make a fleet sale?

"A No."

MR. KAPLAN: Would you read the last question and answer on the page?

THE COURT: You read it.

MR.KAPLAN: "Q Is a dealer free to make a fleet sale to anyone he wishes to?

"A Yes."

MR. PERSON: Page 35, line 18:

"Q Can you tell me what types of fleet sales can be made by a franchised dealer?

"A All fleet sales can be made by a franchised dealer.

"Q Can you tell me what different types of fleet sales are there?

"A I can't get into the individual transactions because I am not aware of the myriad of possibilities there are for a dealer to conclude a transaction. I can say that historically the way they're tracked rp4 "Rock

in the marketplace is the way R.L. Polk classifies them, political subdivision, commercial, rental and leasing. Then with the added one that we discussed briefly was the direct sales to the Federal Government."

Page 42, line 25, breaking into the middle of some testimony.

MR. KAPLAN: I think you ought to have it come in context. There is a three-page explanation of just about everything relating to the fleet end of the business here from page 40 to 43. If anything is important, this is it. I think it ought to be read together.

THE COURT: Mr. Kaplan is not objecting to your reading what you want to read. Would you like to read that?

MR. PERSON: I will read page 40, line 11. I was attempting to abbreviate the matters and not trying to avoid reading.

THE COURT: I think you are abbreviating it and I appreciate it, but is there anything that this will add to what we have already in the record?

MR. KAPLAN: This three pages puts in context a lot of what we have.

THE COURT: If either of you want to read it you can read it.

MR. PERSON: Let him read it.

MR. KAPLAN: "Mr. Kleinbard: Mr. Person, as a result of the questioning this morning, I was going to suggest to you that you permit the witness to explain for the record the significance of the fleet certificate, the fleet plan and the fleet allotment in the hope that it would facilitate your questioning and perhaps shorten the examination, but in any event it would simplify matters and if you have no objection I'd ask him to do that.

"Q Okay, well, that statement is on the record so why don't you proceed to do that?

"A Okay, in attempting to answer your questions this morning we basically talked about three marketing tools that come under somewhat policy decisions of the Fleet Section in the corporation. One being the fleet certificate program, another being the allotments and a third falling into the area of fleet programs.

"In the scheme of General Motors operation, the staff function, i.e., in case of fleet, the Fleet Section, which is part of the marketing staff, they do the homework, so to speak,as to find out what tools are necessary for a division to implement to their dealer organization to be competitive in the marketplace.

"The specific implementation of any program is then up to the division as long as the basic intent of the policy is carried out. Let's kind of take the three areas that we've discussed as they come up.

"In any basic marketing question the first thing you ask yourself is,you know, No. 1, where is the customer? Where does he hang out? What does he look like? Who is he? So the concept of the fleet certificate program was in fact developed and it in fact is an identification program, really nothing more, nothing less.

"If it's reasonable to assume that a company who buys or leases 20 units a year in the conduct of its business then, you know, we can say that constitute a fleet, then the way that that is monitored, to look at that as a basic yardstick from year to year from period to period, is by checking back through the R.L. Polk registrations as to how that market performs.

"And so, that's where the fleet certificate in a sense ties in with the registration analyses that the corporation buys from R.L. Polk, buy, rental, leasing, which is looked at as one market grouping, commercial as another market grouping, ad then political subdivision really as a third.

"The next area that we discussed, we've been eating around the edges of, are the fleet plans per se and, generally speaking, the level of competitiveness for a dealer to participate in the fleet market are based on what it costs to buy your car, sell your car when it was used, maintain it while you own it and so that the normal forces of the marketplace pretty much determine those holding costs as they are called when they are grouped.

2 "General Motors, by and large, through the years had had very good acceptability by the public and therefore when a car is anywhere from a year to three years old, it has historically demanded a good price used. The good price used is often a reflection of a combination of things nonetheleast of which is the original quality of the product and the service that the dealers that sell that product give during the ownership cycle.

"So, through the years other manufacturers have in fact taken certain aspects of the holding cost, a good example would be resale value, and come up with a plan that in effect says to a fleet user we'll utilize any difference where our car comes up deficient to that of a like model GM car. I think that's a good example where a fleet plan is designed to equalize."

Then there was a change of the tape-recording machine and the witness went on.

"A Yes. I said this was a good example of where a fleet plan was utilized to equalize holding costs for a fleet user, and of course fleet plans can take various types or shapes depending on what phase of the holding costs it's designed to equalize.

"Thirdly, we talked a little bit about allotments. Again tracking the activity of fleet users through the medium of registrations within certain parameters you get a feel for the size of the market. Now, that will vary based on economic conditions because commercial fleets, rental companies, what have you, in a sense follow almost the same line as the gross national product."

MR. PERSON: I will read the next.

"The marketing staff's responsibility, that is the Fleet Section, is only to have the policies in place that would enable a division and/or its dealers to participate in the marketplace. We do not get involved in specifically implementing these policies and/or procedures. And I think the best example of that is fleet allotments.

"Each division of General Motors has its own distribution system which in total is unique to that particular division. They are funished the statistical information from R.L.Polk on the size of the fleet market. They are encouraged from a staff level to participate in the fleet market because we feel that each of our car divisions should make their dealers have the ability to participate in the market if they choose so.

"So, in the case of allotments, why, there is no corporate policy, as far as the size or the method in which they are implemented. We only encourage tht they in fact do set aside some of their production for the market."

MR. KAPLAN: I will finish the answer.

"And that gives you a kind of general background showing that each one of these programs is in fact a marketing tool. However, they are all mutually independent and exclusive of each other. They can in fact be used in series but not necessarily so."

pm-2 pgr1 "Rock

MR. PERSON: Page 52 there is reference to a wholesale order and the question was:

"Q Why is it a wholesale car order?

"A By definition.

"Q Are there any other types of orders that a dealer could submit to the factory?

"A No.

"Q So that insofar as the factory is concerned this is a wholesale car order. Is the factory concerned whether the dealer believes that the order may or may not be fleet. Is there any concern on the part of the factory to know how the dealer thinks of this as an order, whether it's a retail, stock or fleet order?

"A Well, our only concern is, is that, as we talked to you earlier, if a dealer submitted a hundred orders for a fleet user and they weren't so designated, he might miss his delivery commitments with the user.

"Q Would this be a basis for terminating an order by the factory?

"A Terminating?"

Page 53, question:

"Q Holing it back if it were mis-designated. Are you protecting the dealer or the dealer's customer by withdrawing a car from production or from delivery?

"A We never pull back. As they come in they're put in the pile. How we indicated that each division has a fleet allotment, so that if, in effect, the orders that come in in lumps, if you will, with a fleet user because they're multiple orders versus, say, an individual, where they come in one at a time, but those can be handled on an allotment basis.

"Q Are any fleet orders submitted to GM by a dealer on an individual order basis?

"A Certainly.

"Q Are those also added to those piles where the lumps are included?

"A No, because if the dealer feels that he has enough retail allotment to cover a fleet order, he may not designate it as a fleet account.

"Q Does the designation of a fleet account then have more relevance than just what the dealer is talking about? It also includes, I gather , your position of whether it comes out of an allotment, a special fleet allotment or not, is that true?

"A I think you asked more than one question there.

"Q If the dealer submits an order marked fleet, this means that the dealer is requesting an extra allotment of cars to fill that order so that the car doesn't come out of the dealer's own retail allotment, is that correct?

"A In most cases, that would be correct."

MR. PERSON: Page 54, 1 to 18:

"Q Could you tell me --

"A But not always.

"Q Could you tell me when this would not be so?

"A It would not be so when a dealer feels he has enough either cars in stock or allotment, on a retail basis, to handle a fleet order but he would want to designate it as a fleet order.

"Q For what purpose?

"A Well, simply because it's on the order form and he wants to let us know.

"Q That he can't sell the cars at retail?

"A Oh, no. There is nothing that says he can't sell a car at retail when it's designated fleet.

"Q How would you know that an order marked as fleet is not to receive an allocation out of the fleet allotment to replace the car that's sold?

"A That would be some sort of a communication between the district manager of the dealer and the car distributor."

MR. PERSON: Page 55, line 7:

"Q Then, could you tell me how can you ascertain at the zone level what number of cars is to be shipped to a dealer during a given month?

"A Well, I'm really not qualified to answer that question in that the only division I've ever really been associated with is Buick. Now you are talking about the implementation of a general policy and, for instance, for Pontiac, for Chevrolet, for Cadillac I really can't answer that.

"Q Well, how about for Buick?

"A Generally speaking for Buick we'll take a certain amojnt of our production and set it aside for our fleet allotment , and then we will take the accounts and as those orders come in and that allotment is available, then we will designate that on a first in basis, weekly.

"Q Now, what type of order from the dealer is sufficient to be able to obtain a portion of that allotment which is set aside for fleet orders?

"A The Buick division, specifically, has what they call, you know, the very large national fleet accounts, and then there are what they call smaller local zone accounts. The designation is usually by which the geography that they operate in, not the size of the company.

"In other words, if you have an account that has cars in all 50 states, for instance, that's looked at as a national accojnt and gets into some additional coordinating, because they could be ordering cars from a hundred different dealers.

"So, if they submitted one order through a hundred different dealers, you'd want to give that, you know, consideration as a fleet account rather than a dealer selling a car. So, there's where you get into an identification process at the division level versus an identification process from a marketing standpoint."

MR. PERSON: Page 57.

MR. KAPLAN: Next two questions, please.

"By Mr. Kleinbard:

"Q Mr. Rock, does the fact that a purchaser is eligible under one of your fleet plans have anything to do with the allotment of cars?

"A None whatsoever.

"Q All right, and does the fact that one of your purchasers has a fleet certificate have anything to do with the allotment of cars?

"A None whatsoever. As we mentioned before those are each marketing tools."

MR. PERSON: Page 57, 11 through the end:

"Q Okay. Well, how do you arrive at the allotment?

"A Well, the first part of your question which was does each division have within its perogative the ability to set its fleet allotment, the answer to that question is yes. A division general manager and in conjunction with his sales manager can make none or all available depending on the wisdom of the market place.

"Q Is there any corporate policy of the factories to be used in ascertaining how the allocation is to be made?

"A None that I'm aware of.

"Q Can you now tell me, then, what your method was in Buick for determining the amount of cars to be allocated to fleet?

"A Would you mean prior to August of '68?

"Q What periods are you familiar with?

"A Well, prior to August of '68 and since January of '74.

"Q Prior to August '68?

"A At that time Buick had just formed a fleet sales department in 1963, and in 1965 we were striving to talk somebody into buying Buicks as a fleet car, because medium priced cars had just begun to be used in commercial service."

MR. PERSON: I'm trying to skip material.

THE COURT: Some of this could be skipped.

MR. KAPLAN: The rest of his answer I think in terms of the numbers is relevant.

THE COURT: All right.

MR. KAPLAN: We were striving to talk somebody into buying Buicks as a fleet car and so forth and he goes on to say:

"And so as I recall, just off the top of my head, we were shooting for 12,000 fleet sales in 1965, somewhere thereabouts, and I believe that was around a 600,000 car year for Buick, so you can see it was a smaller percentage than the market place and our decisions back then were more based on what we thought we could sell."

MR. PERSON: Line 9:

"Q On what type of sale?

"A On sales to qualified fleet users, which were basically rental companies, lease companies, commercial companies.

"Q Is this the basis on which Buick, during that period, determined the amount to be allocated for fleet sales, that is, the anticipated number of orders to be received from qualified fleet purchasers?

"A Well, yes, but we took a little more sophisticated look at the market. We took a look at it by price group. There's no use if X per cent of the fleet market is in the compact car and we didn't have any compact cars then we couldn't arbitrarily take that percentage into consideration. In other words, you can't distribute it to the market that you don't participate in.

"Q What did you consider the fleet market to be? What was your definition of that term?

"A Or the Buick fleet market at that time?

"Q Yes.

"A By how, as a percentage of the total industry or as a --"

MR. PERSON: Page 59:

"Q No, as a type of person who would be within that concept of a fleet market.

"A We looked at him inthe basic traditional definitions used by R. L. Polk as a rental company, a leasing company, a commercial buyer or a political subdivision from a marketing standpoint.

"Q Was there any difference in your definition between the definition contained in the Buick fleet plan or the General Motors fleet certificates for that period?

"A I'd have to review the plans, specifically. There was a point when there were both 20 or more and that was switched to10 or more on the plans versus the certificate, but I don't recall exactly when that was done or which plans it applied to.

"Q What was the method by which the fleet allotment was made available to a dealer? How would the mechanics take place?

"A The mechanics would, you're going awful far back. You'd have two methods. If an order were going to be like,say, a hundred cars to be delivered in some future date, and let's say the particular selling dealer had an allotment of just pick a number, 50 cars a month, then he would have to request of his district manager andultimately the zone manager and the fleet department to put a lump in his distribution system, to handle those hundred cars.

"Q How would this request --

"A Now, if it turned out to be that it was three cars to a local qualified user, that he in turn either just ordered or delivered out of his stock then he could request a repayment from the zone."

MR. PERSON: Page 60, lines 3 through 7:

"Q If the order went into the factory for the 100 cars, how would the factory know that this order was a fleet order?

"A Well, you would usually have a name on it, Hertz, Avis, National."

MR. PERSON: 61, lines 1 through 4, 16 through 23:

"Q Is the concept of fleet on a Buick order form what the dealer considers fleet or what the factory considers fleet?

"A The wholesale order form, depending on what year, what division, would conform to a divisional definition.

"Q You did testify, though, that the Buick during that period did have a definition for fleet.

Could you tell me what the definition was?

"A To the best of --"

THE COURT: Where are you reading?

MR. PERSON: Line 16, same page.

THE COURT: Page what?

MR. PERSON: 61.

THE COURT: Proceed.

BY MR. PERSON:

"Q You did testify, though, that Buick during that period did have a definition for fleet. Could you tellme what the definition was?

"A To the best of my recollection, at Buick we looked at it not as a number as much as the use of the automobile. If the automobile was used in the conduct of the client's business, then we said that it was being used commercially and therefore was a fleet sale."

BY MR. KAPLAN:

"Q Would a person purchasing it for resale be a company meeting your definition of fleet during that period?

"A Conceivably, during that period they could have fallen in that category.

"Q With respect to cars which were purchased for resale?

"A But, I was not aware of any of our cars being purchased for resale, so it really never even became a point to give consideration to."

MR. PERSON: 62, 22-24.

"Q After August 1, 1968, up to December 31, '73 were the divisional fleet sections permitted to use any of their fleet allotments to provide franchized dealers with replacement units when those units were sold to resellers of automobiles?

"A I have no idea."

MR. PERSON: Page 63, 2 to 18:

THE COURT: Would the lawyers come up.

(At the bench)

THE COURT: I'm sorry. I don't see the relevance of any of this. I think that the general description of what the fleet certificates were, the fleet allotments, the so-called fleet programs, maybe that adds something but I don't think that it really does. As far as all the business about allotments, how a Buick dealer gets an allotment for fleet purchasers, I don't recall. You can certainly -- but I don't recall any problem in this case about allotments of Buick cars, or shortages of Buicks, or anything like this.

This testimony is by and large related to Buicks and I don't understand that.

We have already heard that Cadillac had its own specific allotment program. They didn't even call it the fleet program. It was called the leasing and rental.

I can't in my own mind bring this testimony to bear on anything in this case as to whether Nabcor or any of these other people had the ability to get cars or didn't.

MR. KAPLAN: I think that's right.

MR. PERSON: What it does is to show that the factory has a system for permitting the dealers to get extra cars if the dealers were selling it to the permitted group of people. We have had testimony concerning that, that we are not able to get cars because that is the dealers --

THE COURT: You point out to me some testimony or some evidence about inability to get Buicks because the dealer did not have a sufficient allotment. Let's get the Buick volume out.

MR. PERSON: We have Cunningham Buick who refused to deal with us.

THE COURT: Where is the evidence?

(In open court)

THE COURT: Ladies and gentlemen, give us a minute. Desist from talking; I can't hear.

(At the bench)

MR. PERSON: I'm just trying to think of various Buick dealers: Cunningham Buick was one that had refused to deal with this.

THE COURT: Did that have anything to do with anything testified to here? I don't recall testimony about a Cunningham. There may have been reference but I don't recall it developed in any way that makes this testimony something that bears upon the problem.

MR. PERSON: The problem is that without the opportunity of having hearsay testimony concerning the reason for the refusal --

THE COURT: What would your offer of proof be about Cunningham?

MR. PERSON: They revused to deal with us because we didn't have a fleet certificate.

THE COURT: That has nothing to do with this allotment business.

MR. PERSON: I think it cies in. The dealers were saying "fleet certificate." What they meant was getting the extra cars.

THE COURT: What cars was Nabcor deprived of because they couldn't get it from Cunningham? How many Buick sales did you miss?

MR. PERSON: I think we had two losses as a result of that.

THE COURT: Two cars were lost. So?

MR. PERSON: What I'm saying, this having a fleet allotment was continually affecting Nabcor.

THE COURT: You say that but you don't prove it. I repeat to you, Mr. Person, there is nothing you are reading now that's not a lot of general procedure. How that affected specific sales I don't get it. I'm sitting here. I think I'm as receptive as anybody could be. I can't connect this with anything.

MR. PERSON: It's part of that argument of the white list, concerted refusal, and the dealers could not get the cars they needed. The dealers could not sell on a wholesale basis because of the fleet allotment. They were not permitted to designate. We had instances where the dealers had to change their form of ordering. They were ordering --

MR. KAPLAN: They kept getting the cars.

MR. PERSON: It started out going on a

fleet basis but what happens is that it comes out of something else.

THE COURT: You have told me that there were two cars they could not get.

MR. PERSON: I will have to go back and check.

THE COURT: It's hardly worth reading all this. Two cars? The Chevrolet problem is different and the Cadillac problem is different and the Oldsmobile is different and the Pontiac is different.

MR. PERSON: The fleet allotment is there.

THE COURT: What do you mean by that?

MR. PERSON: The code word for it was "fleet certificate." They meant by that that they could not get the cars because they could not get a fleet allotment.

THE COURT: Where is your evidence on that?

I've got a lot of things to do and I need to have a case where somebody comes in and tells me a claim and backs it up and relates it and not just a lot of stuff floating around. I just think we ought to see what our problems are. If it's a matter of missing two Buick sales that's diff-rent from some general thing..

MR. PERSON: This is the general thing. This isthe fleet allotment which prevented Nabcor from getting cars when it had these problems.

THE COURT: I have seen precious little evidence on inability to get cars.

MR. PERSON: I'm trying to show there are fleet allotments.

THE COURT: I think we are going on and on. I'm going to ask you to desist on this deposition.

I am so anxious to get down to brass tacks. Unless we know there is a problem, in other words, if Nabcor can show there were a group of cars or a number of cars or cars anyway you want to put it that could not be obtained and then you want to explain it, and it's being related to some illegal practice about fleet allotments, then it will be of interest. But I'm terribly frustrated with hearing all this general stuff and not having it tied in.

I think we ought to desist. There is another hundred pages, another 50 pages of this in prospect. It's 3 o'clock.

MR. PERSON: May I start off tomorrow at 10 o'clock with Frank Maiorana --

THE COURT: Start with him right now.

Put him on the stand and let him finish his testimony.

Do you have anything from Berg or this other man that relates to the case?

MR. PERSON: May I be prepared tomorrow to put him on the stand? I think it will be done a lot more quickly that way.

THE COURT: What do you have from these other two depositions?

MR. PERSON: There is not that much here.

THE COURT: Is there anything that can be accomplished by adjourning now and taking the rest of the afternoon to go over these materials? The statistical materials, I think they're extremely important. Just the first preliminary flips through that stuff you learn more than I've learned in many days of this trial.

I want to see what that means. I want to see what the situation as to whether this case should be dismissed or not. To me, to hear pages of testimony, it's a total waste of time.

MR. KAPLAN: I agree with that. I don't think there is any link.

The one thought I had was this: I know Mr. Person wants to read at least part of the deposition of this plaintiff, deceased plaintiff, Jamele. If we are going to have to be treated to this one time or another we might as well do it now.

MR. PERSON: I don't have it prepared. It's four volumnes and I was not able to cut it down.

MR. KAPLAN: He was deposed for a day.

MR. PERSON: I have something that thick (indicating).

MR. KAPLAN: It's a long deposition but it's one day.

THE COURT: Are you going to read something from Berg?

MR. PERSON: Berg is essentially much the same thing.

THE COURT: General procedure?

MR. KAPLAN: I thought you designated three pages from Berg. That's what you gave me.

MR. PERSON: That was for the preliminary hearing.

What I would like to do is be able to prepare Frank starting tomorrow and going into these matters to tie in the things.

THE COURT: The question is what are you going to tie in?

MR. PERSON: The various claimed automobile losses, sales, that we have a whole group of them and I can cover those.

THE COURT: That's going to depend on what the record showed, isn't it? He should have a thorough knowledge of what the record shows before he ever takes the stand again if he is going to try to explain problems.

The question is: What are the problems? I just wish we could sit here and try to understand what the problems show, what do you now contend was a problem.

I'm going to adjourn. I'll tell the jury to go home. We'll work and do something. It's better than reading these depositions.

MR. PERSON: To some extent they have some good material.

(IN open court)

THE COURT: Ladies and gentlemen, the lawyers are working on some statistical material. I think rather than have a lot of general testimony about procedures I'm going to let you go.

We'll resume at 10 o'clock tomorrow,and I'll take the rest of the day and work with the lawyers on the statistical materials.

(Jury out)

(Continued on next page)

T3

THE COURT: Mr. Person, give me back that group of statistical material you showed me this morning.

Maybe we can't work together but maybe we can. Let's try it a little bit.

Let's just try to go through Chevrolets a little bit and get some idea. I am taking your sheets and I am going to try to find the first complaint about a Chevrolet.

I have Nabcor order No. 133, it is fairly far down in the pile, but I won't try to count. This was one of those Mid-Town Chevrolet things, wasn't it?

MR. PERSON: Correct, your Honor.

THE COURT: Where would this appear? Would this appear in your materials, Mr. Kaplan?

MR. KAPLAN: Yes, it does, your Honor.

MR. PERSON: It is the 14th page down from the top.

MR. KAPLAN: Our materials are in order according to the Nabcor order number.

THE COURT: We can find it quickly enough.

I have the sheet in the Paul, Weiss material. It is under Luby Chevrolet. It says switched from -- what happened here? Can somebody interpret the Paul, Weiss sheet?

MR. PERSON: Yes. The order had been placed with Luby Chevrolet and we are not making any claim with respect to this initial movement from Luby into Don Allen.

THE COURT: Then you claim there was a problem when it got to be in the hands of Mid-Town?

MR. PERSON: October 3, 1966, the order was given to Luby and on 11/3/66 the order was switched from Luby into Don Allen.

THE COURT: Does it have another order number?

MR. PERSON: No, your Honor. It only has the original consecutive order number of 133.

THE COURT: What happens, Mr. Kaplan, in your records? Can we trace this further?

MR. KAPLAN: No. This one is listed, Judge, under Luby. Our remarks say dealer cross. It means something is crossed out in the log, but we know in this case what happened.

THE COURT: What do you know happened?

MR. KAPLAN: This is one of the orders that Nabcor cancelled at Mid-Town by that letter from O'Brien to Mid-Town.

THE COURT: In other words, as far as the

Mid-Town orders?

MR. KAPLAN: They are all proved specifically.

THE COURT: Whatever that shows it shows. All right.

Let's go to the next problem car in the Chevrolets.

The next is Nabcor Order No. 145 at Mid-Town. The next is Nabcor 140, another Mid-Town situation.

Next is Nabcor 178, another Mid-Town situation.

185, another Mid-Town situation.

188, another Mid-Town situation.

189, another Mid-Town situation.

191, another Midtown situation.

How many Mid-Town things have we got here?

MR. PERSON: About seven or eight, your Honor.

THE COURT: But they would all, I gather, be the subject of specific evidence on that problem, right?

MR. KAPLAN: That is right, your Honor.

THE COURT: Let's just count them up.

MR. KAPLAN: There are eight.

THE COURT: That is right, there are eight. Let's try to go past those and get to others.

Nabcor Order 200, the dealer listed is Luby. Let's see if we can find that in the Paul, Weiss material.

MR. PERSON: This transaction is missing from their book.

THE COURT: Is that listed in there?

MR. PERSON: I find no trace in the front or back of the book.

MR. KAPLAN: Wegive no trace of the Order No. 200. There is no Order 200 in the Nabcor log -- as a matter of fact, I do have it. There is No. 200 in the Nabcor log out of order.

THE COURT: Is that something you should make a sheet on?

MR. KAPLAN: We should.

THE COURT: What is your claim about this car?

MR. PERSON: This was a claimed non-delivery and cancellation of the order, non-delivery by Luby.

THE COURT: But what was the fault of General Motors, if any?

MR. PERSON: That during early 1967 the fleet sales manager told Frank Maiorana that Mr. Luby cut Nabcor off because the dealers were complaining and that Luby had been ordered by the factory not to sell cars to Nabcor.

THE COURT: Where is Mr. Luby?

MR. PERSON: Well, he is not here, but that --

THE COURT: Right, and I would not admit that testimony.

MR. PERSON: But that is making an assumption that the conspiracy is upheld.

THE COURT: Making a what?

MR. PERSON: That is assuming that the conspiracy is proven, I would assume that the damages are not subject to the --

THE COURT: When was this order received by Luby?

MR. PERSON: 11/21/66 or thereabouts -- yes, on that date.

THE COURT: I have Order No. 213 in the Paul, Weiss book. Nabcor received the order 11/30/66. Nabcor placed the order with the dealer, that is Luby, 11/30/66.

MR. PERSON: That was a locate, an immediate transaction.

THE COURT: But it still was filled.

MR PERSON: Prior to the non-fulfillment it was immediate, one-day transaction.

MR. KAPLAN: I can point out 214, 224, 219, 239, all orders to Luby and all filled running through

March 11, 1967.

THE COURT: 219 is an order received from Nabcor December 20, 1966, given to Luby December 20, 1966, and delivered February 8, 1967.

When is this conversation supposed to have taken place where Luby said they wouldn't sell any more?

MR. PERSON: Probably right on that day.

THE COURT: What day?

MR. PERSON: Early 1967, probably occurred on this day of the delivery of that last vehicle.

THE COURT: Was that the last vehicle?

MR. KAPLAN: That is the problem, it is not. There are more.

THE COURT: I have a delivery on the 23rd of February, Order No. 224. there was a delivery made on March 14.

Now when do you say the conversation occurred?

MR. PERSON: In early 1967, your Honor.

THE COURT: It was February a few minutes ago and now it is March.

MR. PERSON: Early 1967.

THE COURT: How early? You take the last transaction and you have Mr. Maiorana saying this is when he was --

MR. PERSON: No, the last transaction would have been when it was.

THE COURT: What?

MR. PERSON: I don't have anything more specific than that, but I had --

THE COURT: Then they started dealing with Matt Slap, didn't they? Where is Matt Slap?

As far as Mr. Maiorana saying what Luby said to him, it is not evidence and the more we talk about it sitting here, the more I am convinced it shouldn't be evidence.

Where is Luby, in Yonkers?

MR. PERSON: Queens.

THE COURT: Is there a New York zone of Chevrolet?

MR. KAPLAN: Yes, your Honor.

THE COURT: Where is Matt Slap?

MR. KAPLAN: In Philadelphia.

THE COURT: Is that the one at Camden?

MR. KAPLAN: No, across the river in Philadelphia proper.

THE COURT: Who is in Camden?

MR. KAPLAN: Rohrer.

THE COURT: Did Anthony Maiorana testify about this?

MR. KAPLAN: He didn't testify about Luby. He did testify about Slap and Rohrer.

2

THE COURT: Do dyou have any other evidence about why Luby quit selling or why Nabcor quit buying? Maybe that is what happened.

MR. PERSON: We have Bill Nash and Frank Maiorana who would testify that, as I have said, that Luby was no longer willing to accept the Nabcor --

THE COURT: I am not admitting that evidence. Have you ever interviewed Mr. Luby or anybody else up there?

MR. PERSON: Mr. Alvarez or Mr. Luby, no.

THE COURT: I am afraid whatever there is to that --

MR.PERSON: I can't see the application of hearsay to the damage part.

THE COURT: I can. I don't think we are talking just about damages. We are talking about liability, whether you have any case.

Now, the last order that was filled by Luby, if it is the last I am just -- we are switching around a little bit, but I have your Order No. 200 and you said that you explained this problem as one related to refusal to sell further. This order was placed with Luby around November 21 or 22 or whatever it was, 1966.

This was well before other orders that were filled by Luby.

MR. PERSON: Locates.

THE COURT: But some are not. Some of these cars were ordered in November or December and filled some weeks later in the next year.

So I ask you again, what is your evidence that Order No. 200 was not filled because of any conspiratorial activity of General Motors? I don't think you have any.

MR. PERSON: The order was outstanding as of the time of the last delivery and whenever the last delivery was, from the information that I have, is where and when it occurred.

THE COURT: But it doesn't make any sense because subsequent orders were filled.

MR. PERSON: I don't have that date that Mr. Kaplan referred to.

THE COURT: Well, following these transactions through the book, would you look at -- let's take Order No. 213 in the Paul, Weiss book on Chevrolet. Have you got that?

MR. PERSON: Yes.

THE COURT: It is not very far down. Then you say that is a locate and 214 may be a locate, so let's pass those.

But I would direct your attention to Order 219, which I assume would not be a locate. That is an order received by Luby on December 20, 1966 and the car delivered February 8, 1967. Do you see that?

MR. PERSON: Correct.

THE COURT: That order was subsequent to this 200 which you are complaining about.

Then we have another, we have -- why do we have two pages on 219? Is there a reason for that?

MR. KAPLAN: I am just checking it. There are in a number of cases two entries in the log with the same order number and I think this is one of them.

THE COURT: We have 214, which was an order given to Luby on December 20, 1966, and filled February 23, 1967.

We could go on and on -- not on and on, two or three more, but there is one, 239, where the order was received by Nabcor January 9, 1967, it was given to Luby on February 3, 1966, but it must mean 1967, and then the car was delivered March 14.

I don't know whether that is the last, but --

MR.KAPLAN: On that one you will note the bottom says dealer cross, which means Luby's name was crossed out in the order log and on this particular car there is written over Luby, Matt Slap.

So it is unclear what happened to this particular one.

MR. PERSON: On the preceding one as well. It was a dealer cross.

THE COURT: But there isn't any such notation for the car delivered February 23, 1967, Order No. 224.

MR. KAPLAN: That is correct.

MR. PERSON: That is probably the last date, your Honor.

THE COURT: All right. I am just telling you I cannot assume that there was some conversation that occurred in mid-February or early February which was responsible for the cancellation or the failure to deliver or whatever happened on car No. 200. So just make a note.

I am telling you car No. 200, I don't see that it is logically covered by your argument. If youwant to try to explain it, you can.

We have car No. 205 which is apparently another sheet of yours relating to Mid-Town. How many all-told were involved in the Mid-Town thing?

MR. KAPLAN: 10. They got two and cancelled eight.

THE COURT: We have nine, and let's pass the Mid-Town thing.

We have another Chevrolet, 229, looking at your sheet. What is the problem on 229?

MR. PERSON: Refusal.

THE COURT: You say this was refused by Luby and shifted over to Matt Slap?

MR. PERSON: That is correct. It should be a dealer cross on the log.

THE COURT: All right. Did you lose the sale?

MR. KAPLAN: The car was delivered February 9.

MR. PERSON: I have indicated delivery 2/9 on the form.

THE COURT: All right. I guess the problem is that Mr. Person claims that Luby at some point got Nabcor off and then Nabcor had to go and place some of the orders that had been placed with Luby, the last -- I don't know, two or three or whatever -- and placed them with Matt Slap and started doing business with Matt Slap.

Now, if the cut-off by Luby were the result of some General Motors conspiratorial activity forcing abcor to go to Matt Slap, how did it hurt?

MR. PERSON: That is interference with the business because it is a disruption and adds to the expense, reduces the profitability and gives you dissatisfaction among brokers and customers for the delays involved; adds to the costs and the efforts that have to be spent retracing your steps instead of --

THE COURT: That is all nice oratory. How did it hurt? I haven't heard a word about anybody telling me we lost orders, we suffered delays. We were doing business on more onerous terms, it was more inconvenient or any thing.

I don't think I have heard any such testimony. Indeed, I don't really think the pitch prior to the time we got into these records was really the delay caused by shifting or the problem caused by shifting. There was more an attempt to indicate that you just couldn't get cars.

I don't think that the witnesses were talking very much about problems created by going from one dealer to another. It wasn't their pitch.

The pitch was we never could get it from anybody, that was the pitch until the records began coming in.

MR. PERSON: No, your Honor. I don't know, maybe --

THE COURT: I am exaggerating, but not too much.

MR. PERSON: No, that has never been the case.

THE COURT: When did you articulate to the jury or to me there was problems about having to go from Luby to Slap?

MR. PERSON: Well, we haven't developed that aspect of the case. I always wanted to put it off because it is difficult to verbalize and difficult for you to really see --

THE COURT: What do you mean, you wanted to put it off?

MR. PERSON: In terms of putting Frank Maiorana back on the stand. I wanted to leave the development of the specific elements of damage until the latter part of the case.

It is difficult to verbalize what happens to a business when somebody interferes with it.

4

pgr1

THE COURT: That's your job. In other words, if the fact is that you were suffering deprivations, damages, inconveniences, because you had to go from Luby to Matt Slap, if that were true, it seems to me a witness with knowledge could get on the stand and say that. If it's fantasy then they should not.

MR. PERSON: What happens is that anything that affects the business in its financial status has an effect on the business thatis not readily -- money is fungible here. If the person is spending the money and resources of the company trying to set up sources of supply that they thought they already had, that takes away the money and energy --

THE COURT: So let's get a witness to tell us what has happened. You have not gotten the witness yet. Nobody has even described this process as being a problem. I don't recall that anybody has taken the stand -- maybe I'm wrong -- and said that we were cut off by Luby Cheveolet in early 1967; we were able immediately to go to Matt Slap but the transition created a problem for us.

Has any witness testified about that?

MR. PERSON: No.

THE COURT: Has anybody testified about that

pgr2

to your knowledge?

MR. KAPLAN: I don't believe so.

MR. PERSON: That was intended to be reserved --

THE COURT: I hate to be sarcastic but the problem seems to get tailored as we get more information. When were you going to present this point to us?

MR. KAPLAN: Anthony Maiorana said something on this subject. He said sometimes it took him as long as three days.

THE COURT: Was he talking about the transition from Luby to Slap?

MR. KAPLAN: Not specifically, your Honor.

THE COURT: Your opening statement, page 24:

"So Nabcor was able to find GM dealers that were willing to sell, people that agreed with Nabcor dealerships, that took orders from Nabcor and submitted those orders to the factory and Nabcor got cars. Yes, Nabcor did get some cars but not very many, and in many cases the cars did not come in after a dealer was willing to sell to Nabcor. A lot of times the dealers would tell Nabcor that it was no longer going to deal with Nabcor for reasons we will explore. I will not try to go into everything."

So you mentioned that, but I don't think there was testimony. I don't want to labor that. Let's go on.

So you are now advancing the idea that there was liability on the part of General Motors and damages recoverable in part because of the need to make a transition from Luby to Matt Slap. I would be interested to know what the evidence is. I don't recall any.

MR. PERSON: Your Honor, going back tothe reason that Frank Maiorana left the stand, that was to be able to go into other matters and to hold up the damages --

THE COURT: This is not damages. If you thought it was damages, just, please, this is liability and damages because if General Motors was inducing Luby to quit dealing, that is liability.

MR. PERSON: But in connection --

THE COURT: It's not of utility. You could have talked to Luby years ago. You could have interviewed him. You could have been prepared to put him on the stand. You could have asked for their records.

You could have done a lot of things. You could have talked to General Motors people who were in touch with Luby. There are lots of ways to develop proof besides having your client get on the stand and say that Luby said that General Motors said.

Let's go to the next one.

I guess we need to take a break.

(Recess)

THE COURT: The next sheet that I have got in Mr. Person's sheets is relating to order 239. That's one of these cars that was originally ordered from Luby and apparently the order was filled with Matt Slap. That's that transition problem.

There really are not too many Chevrolets referred to in Mr. Person's sheets that relate to his problem transactions.

I would like to go to 304. That's the next one. That's a Chevrolet that was ordered from AC Chevrolet. The claim is a late delivery, loss of customer, but the car was ordered from Nabcor April 11, 1967. It was ordered from AC Chevrolet the same date, and it was delivered May 31, 1967. Is that unusual?

MR. KAPLAN: We claim not.

THE COURT: When did the broker get the order? Maybe there was a delay by the broker in giving Nabcor the order. What is the delay?

MR. PERSON: That period of time, the 50-day wait.

THE COURT: AC sold a lot of cars to Nabcor. Again, how does this fir into the overall picture of the transactions with AC? Is there evidence that AC was in cahoots with General Motors or anything like that?

MR. KAPLAN: I think,your Honor, there is going to be evidence that General Motors paid fleet allowance to AC Chevrolet on Nabcor transactions. So to that extent I suppose they're in cahoots.

THE COURT: Where were they?

MR. KAPLAN: Jersey City.

THE COURT: It is not covered by any of these lists that we have got?

MR. KAPLAN: That's right, your Honor.

THE COURT: When did hte deals with AC start?

MR. PERSON: On 3/13/67.

THE COURT: Right.

I've got order 238 which was placed by Nabcor 3/13/67 with AC. Delivery was April 18.

There has never been, to my knowledge, any testimony from the plaintiffs as to the trend of these transactions except on the cross-examination of Anthony Maiorana. That's the first time, it seems to me, there was any attempt to describe anything that put this thing together.

In other words, I don't recall Frank Maiorana or any other one of the plaintiffs' witnesses except on the cross-examination of Anthony doing anything like testifying and explaining: We started with Luby; then for some reason we went to Matt Slap; and then at about the same time we started buying Chevrolets from AC Chevrolet. Thus giving me a coherent picture of the trends of the transaction and trying to explain from the plaintiffs" standpoint what problems arose in that trend of events.

It appears just from the very beginning, look at the Chevrolet materials that Paul Weiss has furnished, that this is what happened and it's an interesting story, it seems to me, as far as it goes.

You had a few transactions with Norton Penske, and then a lot of transcations with Luby, and then at a certain point Luby apparently stopped doing business with Nabcor and Nabcor stopped doing business with Luby, and they move into Matt Slap and at about the same time, contemporaneously, they're buying from AC Chevrolet.

Of course, there is this midtown situation, but there is kind of a story here which you can gather, but none of this has been explained by the plaintiffs.

Matt Slap and AC were sources contemporaneously.

MR. KAPLAN: Matt Slap quite a bit longer than AC, but otherwise, yes.

THE COURT: Out of all these many, many Chevrolet purchases there are very, very few that are complained about.

We have covered 304, which I must say to you I find in the context of the overall of being with AC Checrolet doesn't look like it's a problem.

Let's go to the next Chevrolet in your thing, and that's 323. This is something you say was bought by Turco or ordered by Turco from AC Chevrolet and not delivered, and, indeed, the Paul Weiss sheet on that car shows an order and shows a cancellation, but who cancelled? What's the evidence?

Again if AC Chevrolet was in cahoots with

GM to deprive Nabcor of cars I would not think there would be one isolated cancellation in the middle.

(Continued on next page)

T5

MR. PERSON: That is not the end, your Honor.

THE COURT: I think you are right. Well, I have 323 and 324 -- no, I am sorry.

MR. PERSON: That is the last date that I can see.

THE COURT: But 335, A.C. Chevrolet, received an order on June 6, 1967, and there is just nothing in there about any disposition. What happened on that?

MR. PERSON: I show a transaction of June 22, 1967, O'Brien, in the back of the book. That would be 0053 in the back of the book, page 273 out of 285-- 12 pages from the back of the book.

MR. KAPLAN: Your Honor, the ones at the back of the book are in chronological order by delivery date and the one referred to is June 22.

THE COURT: All right. Maybe mine are a little out of order.

You have a delivery date June 22?

MR.KAPLAN: Yes.

THE COURT: Let me find it.

MR. KAPLAN: Where it is printed at the top of the page.

THE COURT: What is the significance of this then?

MR. PERSON: That is the other end, that shows what happened to the car, it shows what happened to the order.

THE COURT: What did happen?

MR. PERSON: Joseph O'Brien.

THE COURT: Who is Joseph O'Brien? It was cancelled by the original customer and then Joseph O'Brien got it?

MR. PERSON: He was the original purchaser, the ultimate purchaser in Turco.

MR. KAPLAN: What transaction?

THE COURT: What happened? Was the car delivered? Is the delivery reflected at the back of the book?

MR. PERSON: If we are looking at the same one, 335, or are you on a different one, your Honor?

THE COURT: I am on 323. Maybe I mixed you up, I don't know.

MR. PERSON: I was looking at the next one down in my list.

THE COURT: Could we just go back as a for instance? 323 shows nothing about delivery but shows cancellation in the Paul, Weiss book.

Is there anything further, any further information about that, or is that the end?

MR. KAPLAN: I think it is the end, your Honor.

THE COURT: All right. I may have started and I should have started by asking you if you have any information or evidence about the reason for the cancellation or what happened vis-a-vis A.C. Chevrolet.

I think then you said to me, Mr. Person, this was at the end of the transactions with A.C. Chevrolet.

Can anyone tell me this was or was not at the end of the transaction with A.C.?

MR. KAPLAN: That cancellation is dated later than any other date that we know about at A.C. Chevrolet.

THE COURT: All right.

MR. PERSON: This was where A.C. Chevrolet was unwilling to submit orders to the factory and was selling demonstrators to Nabcor instead of ordering the cars from the factory.

THE COURT: What is the evidence?

MR. PERSON: It is our testimony of Frank Maiorana in that respect. It is hearsay testimony. The fact he said it was getting many dealer complaints because Nabcor was selling instead of leasing cars.

They did not want to take chances ordering cars for Nabcor.

THE COURT: This is who told this to Mr. Frank Maiorana?

MR. PERSON: The manager of A.C. Chevrolet.

THE COURT: A.C. is over in Jersey City?

MR. PERSON: Correct.

THE COURT: I do have this transaction, 323, which is a car apparently ordered from A.C. Chevrolet May 15, 1967, cancelled July 12, 1967.

Then look at 366, Mr. Kaplan. What does that mean?

MR. PERSON: It is an erroneous dealer.

MR. KAPLAN: It looks like -- I would just check it against the log to make sure we are accurate.

This is what the log says: it says they received the order in July and placed it with A.C. Chevrolet and it was cancelled on July 11.

THE COURT: All right, let's go to --

MR. PERSON: It also says it was a Pontiac Catalina ordered from A.C. Chevrolet.

MR. KAPLAN: It does say that.

THE COURT: The next item in Mr. Person's group of complaints is that Askew Chevrolet, that is

Nabcor Order 583, and I think we had testimony on this, but I would be interested to see the sheet.

583, the sheet isn't too revealing, but we have testimony on that.

Now, we have the very last sheet of Mr. Person'a group that relates to a Chevrolet, 1967 Camaro, which is apparently not referred to in the log.

MR. PERSON: It is a deal picked up through the attached invoice and entered manually in the log based on the invoice.

THE COURT: What is the significance of this last one?

MR. PERSON: That Nabcor refused a demonstrator from A.C. Chevrolet.

THE COURT: You know, an awful lot of these sheets in your group relate to Cadillacs and let's pass the Cadillacs for a minute.

In the remaining few minutes let's try to get a sample, just while my memory is clear, it seems to me on the Chevrolets the problems that are raised, and this may be incomplete, but I would just like to voice it, it seems to me from our going through this the problems are raised by Mr. Person relate to the following:

The claim that Mid-Town Chevrolet unlawfully refused for unlawful reasons;

The claim that Luby Chevrolet cut Nabcor off forcing a transfer of business to Matt Slap and to A.C. Chevrolet;

The claim that A.C. Chevrolet ultimately refused to deal and was trying to sell demonstrators to Nabcor to conceal the transactions from General Motors, and I would think that is about it.

MR. KAPLAN: I also question the last.

THE COURT: I mean, I am not talking about your position, but do you have any claim that Matt Slap refused you cars?

Because my memory could be wrong, but I don't recall any of these sheets of yours --

MR. PERSON: The Corvette.

THE COURT: The Askew Corvette, that relates to Matt Slap. Anything else about Matt Slap?

MR. PERSON: No, your Honor.

THE COURT: All right.

Let's just take the Chevrolet situation. Those claims have to be put in context of what evidence there is, and I won't try to summarize that. But just giving them all they can be given, those claims have to be put in the context of the fact that there are X number of cars where there are claimed denials or delays, and we can count those up and pit those against deliveries of somewhere between 185 and 186 cars, something like that. And that is the problem.

MR. KAPLAN: Before we go on, I would just like to make a point lest by being silent I be deemed to have waived it.

When we started this trial four or five weeks ago or whatever it is, we raised the question as to the propriety of testimony that Nabcor went to dealer X and ordered or didn't order or whatever but got no cars and went to dealer Y.

In the light of this afternoon's discussion that problem is going to come up again because we take the position that whatever happened with Luby Chevrolet cannot be connected to General Motors and therefore is inadmissible because it is technically irrelevant, not admissible testimony and, to the extent that it might be admissible testimony, it is just prejudicial.

Luby may very well have not sold to them.

THE COURT: All right. Now, another thing that it seems to me is the context in addition to the dealers we have talked about, that is Luby, Matt Slap, A.C., there were also purchases of Chevrolets from I guess

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Rohrer, were there not?

MR. KAPLAN: Yes.

THE COURT: In other words, I haven't gone through, but there may be other dealers referred to in the statistical material besides the one where there were some problems?

MR. KAPLAN: There are.

THE COURT: All of that circumstantial on the question of whether General Motors was engaged in any conspiracy to prevent its dealers from selling to Nabcor.

If we will just take a minute and start with the Pontiac thing, what is the first Pontiac you have referred to?

Most of the first things are Cadillacs and can you locate the first Pontiac, Mr. Person?

MR. PERSON: Ruckel Pontiac.

THE COURT: What is the number?

MR. PERSON: 241.

THE COURT: Is this part of that group of orders that were sent back?

MR. PERSON: That is correct.

THE COURT: I guess there is not muchmore. In other words, that is the subject of specific testimony, I guess, so we don't have to talk about that very much.

Let us look at 241. Was that then sent on to Bates Pontiac?

MR. PERSON: Correct.

THE COURT: Did you get it from Bates?

MR. PERSON: I don't believe so.

MR. KAPLAN: If your Honor please, this is a perfect illustration what the problem is about that other delivery column of our summary sheet.

If you look in the back under the last tab, there is a car delivered by Bates on March 23, 1967, a Pontiac, and it may very well be the same car. The delivery dates coincide almost precisely. There is just no way of tying in this delivery by Bates on March 23 to the order.

THE COURT: You could draw a reasonable inference.

MR. KAPLAN: You certainly could. That is my point.

THE COURT: All right.

Have you any complaints in here about Pontiacs since that Ruckel situation?

MR. PERSON: Another Bates Pontiac on 315.

THE COURT: You mean Bates refused or it was filled?

MR. PERSON: That was a Bates refusal.

THE COURT: What number?

MR. PERSON: 315 and 320.

THE COURT: Let's look at those.

MR. PERSON: 326, 328.

THE COURT: Just a second.

315, what do you claim the story was here, because Bates had been delivering a lot of Pontiacs. It looks to me -- I am just flipping through very quickly -- what is the story here?

MR. PERSON: That on or about the end of March according to an officer of Bates the Pontiac zone representative had been down to Bates' place of business and told the principals not to sell cars to Nabcor.

THE COURT: When did that occur?

MR. PERSON: Shortly before the last cars were delivered, by enough time to have the last cars delivered.

THE COURT: This is another situation where there were some cancellations at the end of some dealings, right?

MR. PERSON: Correct.

THE COURT: And that was a result of General Motors' activities?

MR. PERSON: Correct.

THE COURT: So you have 315, 320 --

MR. PERSON: 326, 328, 334.

THE COURT: What do you say as to that, Mr. Kaplan?

MR. KAPLAN: Let him prove it. I have no idea why Bates didn't sell. For all I know Nabcor cancelled the orders.

THE COURT: What is your proof on that, Mr. Person?

MR. PERSON: The proof on that would be the proof of the conspiracy and the non-hearsay proof of the terminations.

THE COURT: What happened after? Did they go and get another dealer as happened after Luby Chevrolet or what?

Can you place the date of the conversation, because there were lots of deliveries here. Bates was delivering a lot of cars.

Bates delivered a car May 31, 1967, a car May 12, 1967.

MR. KAPLAN: No. 309 was on June 16.

THE COURT: Anyway, did the dealings with Bates terminate about that time?

MR. KAPLAN: So it appears.

THE COURT: Were they able to get any more Pontiacs or did that shut off the supply of Pontiacs?

MR. KAPLAN: In July of 1967 they started -- June, rather -- buying from Al Wilson Pontiac and from Wilson and Kline, I believe, they got absolutely every Pontiac they ever ordered.

THE COURT: What about that, Mr. Person? Any other problems about Pontiacs?

MR. PERSON: We had interference by the zone with the orders that had been placed for Nabcor.

THE COURT: With whom?

MR. PERSON: With Kline Pontiac.

THE COURT: I see a reference to Kline Pontiac, Nabcor Order 778, 779 and 803, 817, 831. You have it marked late delivery. This is 1970, right?

MR. PERSON: Correct.

THE COURT: They got a lot of Pontiacs between May and June of 1967 and 1970.

What happened on Kline?

MR. PERSON: These automobiles were held up in their production or delivery by General Motors because they had come out of a fleet allotment that wasn't proper because it was Nabcor.

THE COURT: With whom?

MR. PERSON: With Kline Pontiac.

THE COURT: I see a reference to Kline Pontiac, Nabcor Orders778, 779 and 803,817, 831. You have it marked late delivery. This is 1970, right?

MR. PERSON: Correct.

THE COURT: They got a lot of Pontiacs between May and June of 1967 and 1970.

What happened on Kline?

MR. PERSON: These automobiles were held up in their production or delivery by General Motors because they had come up of a fleet allotment that wasn't proper because it was Nabcor.

THE COURT: Where is the evidence on that?

MR. PERSON: That is annexed, photocopies of exhibits to those.

THE COURT: These are things you still need to put in?

MR. PERSON: No, they are in, your Honor.

THE COURT: We will have to study those. But this is the end of your problems on Pontiacs, right? These are delays.

MR. PERSON: We had other problems. I am being reminded then that is why we had a side bar conrp

ference on it.

There was some local price-fixing by the Pontiac people together with the zone telling Pontiac dealers, one of them at least, how to write a letter agreement with Nabcor, but there is a hearsay problem in connection with it.

THE COURT: There sure is.

Do you mean those are letters about prices?

MR. PERSON: Correct.

THE COURT: And they took one of the higher prices?

MR. PERSON: But one of the paragraphs in the letter was dictated by General Motors.

THE COURT: Who says?

MR. PERSON: According to Joe Bonner working with Schultz.

THE COURT: Who is Schultz?

MR. PERSON: One of our brokers and somehow related to Kline.

THE COURT: What would be the evidence on that?

MR. PERSON: It is hearsay, and therefore our attempts --

THE COURT: Who was it, what dealer got this paragraph dictated to him by General Motors?

MR. PERSON: Al Wilson.

MR. KAPLAN: I think Mr. Person is confusing the dealer.

MR. PERSON: Mr. Maiorana had talked with Mr. Kolmar, who told Mr. Maiorana concerning the factory. Mr. Kolmar is a Pontiac owner. There were three.

THE COURT: Who was it that got the paragraph dictated to him?

MR. PERSON: Kolmar Pontiac.

THE COURT: Did Mr. Maiorana then deal with Kolmar? Have you talked to Kolmar?

MR. PERSON: No, your Honor.

THE COURT: Just another one of the familiar hearsay problems.

How long were things delayed,in any event? We have switched our field, but you claim that the prices were fixed?

MR. PERSON: There was some price-fixing by some Pontiac dealers. Kolmar, Pallino Buick-Oldsmobile and Buick --

THE COURT: What was the harm to Nabcor as a result?

MR. PERSON: It forced Nabcor to find other rp

sources or using other sources.

THE COURT: Besides whom?

MR. KAPLAN: The record shows on August 18, 1969, Nabcor got a letter from Al Wilson Pontiac saying they were going to raise their prices. They went out and asked a whole bunch of Pontiac dealers for what they would charge them for cars and got letters back from Kolmar and Kline Pontiac with a variety of different prices. The Kline Pontiac letter is dated August 21,
3 1969, and three days later and thereafter they dealt exclusively with Kline, and that is the record.

MR.PERSON: Al Wilson was the one.

THE COURT: After that it was all Kline?

MR.KAPLAN: All or substantially all.

THE COURT: Because Wilson, you did say Wilson had raised the prices?

MR. KAPLAN: Right. I guess there was some transaction with Apuzzo Pontiac.

THE COURT: It seems to me if we went through, you could take the sheets that Mr. Person has furnished and other information and very quickly arrive at what the problem areas are and they are limited.

I think that you ought to make that kind of analysis tonight, and I am sure you are already making it, but I think in connection with any proposal that Mr. Maiorana resume the stand tomorrow to talk about the so-called damages, and Mr. Maiorana can talk in general terms if he wishes, but the time is really past when general testimony is going to mean anything, and I think you better see, if you want to have this testimony mean anything, you better relate it to the documented situation and what we have been through has been extremely helpful to me this afternoon, and just going through very, very quickly the Pontiac and Chevrolet situation.

I would be interested in it and it is very easy to do, simply count the sheets furnished by Mr. Person and see how many cars are involved in each and how many dealers.

That is all we will do tonight. I have another hearing.

(Adjourned to November 23, 1976, at 10.00 A.M.)

NATIONAL AUTO BROKERS CORP., et al.

vs. 70 Civ 5 421A

GENERAL MOTORS CORPORATION, et al.

November 23, 1976
10:15 a.m.

[illegible].Trial resumed.

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(In open court; jury absent)

THE COURT: First of all, I would like to confirm this, Mr. Person, that the sheets that you provided yesterday represent the plaintiffs' total claims regarding inability to obtain cars to fill Nabcor customer orders, delay, or any other problem with regard to orders, or the filling of orders, received from customers of the Nabcor system; is that right?

MR. PERSON: No, your Honor. There were delays that are reflected in the transactions, delays --

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THE COURT: What is the purpose of giving me all these sheets of paper? I thought this was definitive. I asked you to give me a definitive statement of the instances where you claimed on behalf of the plaintiffs, any of these plaintiffs, that cars could not be obtained to fill the orders obtained by the plaintiffs, where there were delays, or any other problems regarding orders obtained by the plaintiffs.

Have you given me that or haven't you?

MR. PERSON: Multi-Make and General were excepted from that.

THE COURT: Who excepted them?

MR. PERSON: That was done when we were discussing --

THE COURT: In other words, this refers to everything except Multi-Make and General?

MR. PERSON: What Multi-Make and General did in Buffalo is not reflected.

THE COURT: With that amendment --

MR. PERSON: I have not reflected the delays in delivery, that the 60, 80, 50-day delays which are reflected in the books of the companyand the various documents. I have not attempted to do more than point out that there were delays. I have tried to get GM to come in and testify as to the meaning of these delays, and you quashed that subpoena.

THE COURT: Mr. Person, you've totally misunderstood my question. You get busy. When will you have a complete statement of your claims?

MR. PERSON: I need to be able to have General Motors testify as to what the delays to be expected are.

THE COURT: You are not answering my question. You have had a tremendous amount of time. One need not go into that in such elaboration. You have had a lot of time. You have been requested by me at least beginning Sunday night, the 7th of November, and it was probably before that, to provide a statement of the situations in which you claimed there was a problem about obtaining cars, any problem.

MR. PERSON: I thought we were talking about cancellations and I have prepared --

THE COURT: You get up a complete list. When will you have that?

MR. PERSON: Is this to be done without the ability to be able to ascertain from General Motors what the meaning of a length of time is?

THE COURT: Mr. Person, I want an answer to my question. You must know at this stage what you are claiming. You are the plaintiff. You have had discovery. You have had trial. I cannot express to you the frustration -- I think it's legitimate frustration -- that I feel with my inability to get from you a definitive statement of your claims.

MR. PERSON: In two days I can go through the books and pick out extended periods of time which we claim are part of the illegal activity.

THE COURT: In other words, now that you have got the General Motors material you can expand your claims? Is that what you are telling me?

MR. PERSON: You may not believe this, and that relates to one thing I wanted to do before we even go into your chambers, and I still make that request, to go into your chambers to make another motion, I don't want to make it in open court, but the documents that General Motors has submitted are really nothing if you will take a look at them. All they have done is had a lot of fancy computer talk.

The documents are no more than I prepared and far less. I have better documents relating to this, compiled far --

THE COURT: I want you to get me the best documents, the perfect documents, anything you choose to submit, but I have to know a statement of your claims. As the Court, I'm entitled to have that at this stage. I should have been able to produce a response from you on that subject when we first discussed this subject November 7. I was appalled that you did not have the material.

MR. PERSON: Your Honor, I have been preparing this and I have the material but I was waiting for GM's production on the grounds they were going to do something sophisticated. They have done nothing sophisticated but tried to confuse things.

Therefore, I can go through my own records, and maybe resorting to theirs at times, and be able to identify the length of time between the order and the delivery. That I can do.

THE COURT: I'm here and now directing you to provide me and to provide General Motors counsel with a complete list of all instances in which you claim that any orders received by any of the plaintiffs were not filled, were delayed in the filling, or suffered any other problems which you are making claim for in this lawsuit on the plaintiffs' behalf, and which you attribute to any illegal activity on the part of the defendants.

I am directing that what I have said just now be delivered to you by the middle of the day in typewritten form so you have it and there is no mistaking it, and I am directing that this be done by tomorrow morning. I see absolutely no reason for any further delay.

You are virtually on the point of resting, or you should be. You should have had this material. You should right now know the answer to my question. You should have known it long ago. It will be in my hands tomorrow morning and it will be in the form of additional sheets to what you have furnished.

Anything that is not produced in court by 10 o'clock tomorrow morning will be barred, as far as any claims of the type I am speaking of.

MR. PERSON: As part of this I'm claiming that the General Motors method of using allotments and the retail allotments have affected the entire Nabcor system. To that extent I'm claiming that every car that we attempted to order or every car that we ordered was affected by that.

THE COURT: That's a different type. Every car is a big statement.

Look, Mr. Person, if you just make a claim that's so general --

MR. PERSON: It is not general. It's highly specific.

THE COURT: If it's so general that it includes every car without differentiation, then I can deal with that. But I want to know the specific instances. You started to give me this material in these sheets. You know what I'm talking about and I think you knew what I was talking about.

MR. PERSON: No, your Honor. It said cancellations. That's what I understood it to be. I put in a couple for my own purpose.

THE COURT: That's very interesting. I'm goad to know this. This is an example of the ever shifting claims and contentions of the plaintiffs' side.

MR. PERSON: It's not ever shifting.

THE COURT: I'll not argue it any further.

MR. PERSON: May I make a motion in your chambers?

THE COURT: We're in open court. Make any motion you wish.

MR. KAPLAN: Before the application, your Honor, I would like to say, for the record, as far as this claim about fleet allotments is concerned, it is our position that no such claim can be raised in this lawsuit. It's raised now for the first time after Mr. Person learned that 80 per cent of the cars he ordered were delivered.

That claim is not pleaded in the complaint. That claim was not raised in the interrogatory answers. That claim, I believe, is not made in the plaintiffs' pretrial brief. We take the position it should not be properly heard.

I say that for the record.

MR. PERSON: We allege delays in the complaint and this is the reason for the delays.

THE COURT: The writeups that you furnished yesterday morning, do they contain the plaintiffs' complete listing of instances where cars were denied or refused to be delivered except as pertains to Multi-Make and General? Can we say that much of the case is complete?

MR. PERSON: May I put some qualifications on it so I'm not misunderstood, your Honor?

Number one, the answer essentially is yes.

Those are the orders --

THE COURT: What are the exceptions?

MR. PERSON: The exceptions are that there were various orders received and unable to be acted upon which we don't have a specific record on that I can put in here. Insofar as that is concerned, I obviously have not been able to do anything with it. Orders that were outside of the time period I have not put in.

THE COURT: Mr. Person, I want to know this: Do these sheets of paper that you produced yesterday contain all ofthe claims of the plaintiffs except for General and Multi-Make of inability to obtain cars to fill orders during the time period covered by the lawsuit, that is, December 10, 1966 through December 10, 1970? Do they?

MR. PERSON: Other than instances --

THE COURT: Of course.

MR. PERSON: Also, your Honor, the refusals to deal by dealers at the very outset and by others. In other words, there are reasons for delays that we suffered from. Insofar as specific deals are concerned, I have tried to be complete other than what I have, which is only unidentifiable orders.

THE COURT: My statement was couched in terms of specific orders. As I understand it, these documents contain the entire claims which you believe can be proved in this lawsuit by evidence relating to specific orders obtained by the plaintiffs which were not filled, and excluding General and Multi-Make, and my statement is very carefully couched to refer to specific orders that were obtained by the plaintiffs and not filled.

I am excluding from my statement claims such as the testimony of Mr. Strimple and Mr. Bolling, that they went around in 1966 and attempted to obtain commitments for 200 to 400 cars. I am excluding that kind of thing, and I'm referring in my statement only to specific car orders obtained by the plaintiffs which were not filled.

Do you understand me?

MR. PERSON: I think I do, and I think the answer to that would be yes, and it is yes, with the exception of any orders that have been received but not entered in the log for which we have no specific way to identify them.

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THE COURT: But then aren't you going to try to prove it in this lawsuit?

MR.PERSON: I think there is an inference that can be drawn.

THE COURT: Mr. Person, I can't deal with things which can't be proven. Are you going to try to prove such orders and the non-fulfillment of those orders?

MR. PERSON: I would like the jury to be able to draw inferences from these events that we proved as to what happened.

THE COURT: You get me the specifics on these instances.

MR. PERSON: We are doing that. I have given you those.

THE COURT: Where have you given me those, in these sheets of paper?

MR. PERSON: The sheets of paper.

THE COURT: You are going round and round. I asked you if the sheets of paper were complete as far as specific orders not filled.

MR. PERSON: Yes, the answer is yes.

THE COURT: The answer is yes.

MR.PERSON: Subject to what I said, which doesn't substantially change the thrust of your question.

THE COURT: The only thing you want to supplement as far as these sheets of paper were instances of delays and have those by 10 o'clock tomorrow.

MR.KAPLAN: I would like to comment on this, because Mr. Person yesterday specifically represented to the Court, and I quote with respect to these sheets, page 2925 of the transcript:

"The Court: Mr. Person handed me a batch of forms filled out. What does this represent?

"Mr. Person: These represent the transactions which we complain about, that is, essentially the cancelled automobiles resulting in loss to the Nabcor System."

That followed a discussion on Friday in which the made the argument about delays.

THE COURT: Look, it is very important to have a final definitive statement of these claims. Mr. Person has represented that these sheets now in hand constitute that. I want to know those record references.

MR. KAPLAN: Page 2925 of the transcript.

THE COURT: At the same time I will give him the opportunity to prepare additional sheets overnight and he can attempt to submit them. If you have objections to that, at least let's see what happens.

But tomorrow morning at 10 o'clock is it and that will be that, and if there are any valid objections to the additional material submitted by 10 o'clock tomorrow morning, we will hear them.

MR. KAPLAN: Fine. My concern is as the trial progresses, there is more and more that the claims keep changing and getting bigger or newer or whatever.

MR.PERSON: There is just none of that. We have brought up the fleet allotment before. There have been depositions of GM personnel where Mr.Kaplan was present, so he is not surprised,and delays --

THE COURT: What I would like to have you all prepare for is this: after the plaintiffs rest I assume there will be motions to dismiss. Now, I believe that the motions to dismiss may require a good deal more time and work than such motions usually take. They usually don't take any appreciable time at all.

But it seems to me these motions should require a fair amount of deliberation. There are lots of problems about them and I think it behooves both sides and it behooves the Court to make a very thorough canvass of this record and among the things that have to be canvassed are the nature of the claims made and I intend and I think I hope to have help from counsel on this, to start with the complaint and to take the relevant statement of the claims and see what the claims have been and what claims are properly before the Court now and see how they developed.

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It will make a difference to me if I believe that the claims have been artificially shifted in order to adjust to the proof.

MR.PERSON: Will you also say if the representations continually shift as to what our claims are, that will make a difference?

THE COURT: Fine. It is all important and it is intricate and requires an unusually amount of work and decision, and I will expect to have the maximum help from counsel and --

MR.PERSON: Could this go to the jury without the motions to dismiss inasmuch as their defense would be about two weeks, the amount of work required is substantially greater, and I think putting in a full record they will be able to show the case to be decided at the far end with more evidence and the total record, instead of going through this effort right now, which I think is wasted.

THE COURT: I was told there will be motions to dismiss. I assume that the defendants contend they have a right to dismissal without another several weeks of trial, putting on their evidence. If they don't feel that and are not going to make such motions, I don't have to worry about them. But I assume you are going to make motions?

MR. KLEINBARD: Your Honor, we are going to make such motions and we have a right to make such motions and intend so doing.

THE COURT: I know that Mr. Person has indicated some views about this to the contrary, but from everything I have seen of the statistical materials they are extremely important and I would go so far as to say there should be a device by which they are before the Court in connection with these motions to dismiss.

I assume that the plaintiffs will not introduce into evidence the General Motors statistical materials and I am assuming realistically that their admission would not be stipulated as part of the plaintiffs' case.

MR. PERSON: Which materials did you say?

THE COURT: The statistical materials produced by Paul, Weiss. Strictly speaking, that would be something which would be part of the defendants' case, but what I am leading up to is this:

I think we have an extraordinary situation on our hands. The trial has now consumed, if we include the preliminary hearing, a total of 25 trial days. That is not the longest case in the world by any means, but it is far longer than it deserved.

I think that the work that has been done to get these hard facts about the transactions should be before the Court in connection with the motion to dismiss. I would go so far as to consider the receipt of the items of evidence solely for the purpose of the motion to dismiss.

MR. PERSON: I would object to that.

THE COURT: As being evidence which would come in on the defendants' case and which would have an essential bearing on the progress of the case henceforth. I am not articulating it very well, but the Court has discretion to --

MR.PERSON: To make a partial defense?

THE COURT: Why don't you let me finish?

MR.PERSON: I would like to make the motion before I forget it.

THE COURT: I am saying this, that the Paul, Weiss materials are not just little fragmentary items of the defense case. They are basic, they are important facts in this litigation. They are in my view dispositive and determinative if not of the whole case in and of themselves, they are dispositive and determinative of great checks of the case, greant chunks of the damage claims.

It seems to me that the Court had discretion to consider these items on a motion by the defense to dismiss, and I want you to consider that and, as I say, it seems to me they can be received solely for the purposes of the motion to dismiss, recognizing that if the case went forward they would be part of the defense case, although not all of them.

MR.KLEINBARD: I just want to say I think they would properly be before the Court as summaries of documents already in evidence because all of the material, most of the material supplied are from documents already in evidence.

This is under Rule 1006, summaries of Plaintiffs' Exhibit 450, police books and all the materials that we have been able to gather, which is substantially what we put forward in the material submitted.

THE COURT: What you might need is to call a witness before the motion to dismiss and explain how these were gotten together.

MR. KLEINBARD: I am perfectly willing to do that. I think the rule would permit us to do it without it, but we will do whatever your Honor feels would make the record a better record.

THE COURT: I am going to suggest this just as a pure matter of mechanics and presentation.

The materials I found helpful because they told the story. You can go through chronologically and that process is somewhat interfered with by having a segment of materials separated at the back and I would appreciate it if you could have your people get together, get going right away on a set. If you have an extra set I would appreciate your using it or you can have mine mine if you don't have an extra set, but take a set and incorporate the sheets at the end of the volumes chronologically in the front so we have one consecutive chronological set of sheets for each automobile.

Now, I would simply mark the sheets that are taken from that portion at the end of the book, you could put it in red ink or something like NL, or some such legend, not in the log. I don't think youhave to write it out,but some legend so that in going through these things you know that everything is from the log except the NL sheets.

MR. KLEINBARD: Yes, your Honor.

THE COURT: But it is impossible really to follow this unless this is all arranged in completely chronological fashion.

MR.PERSON: The good faith of their preparation is really in doubt. If you look at Luby Chevrolet particularly, they have approximately 15 deals in the back that very easily translated to deals in the front by matching them up, and they have them as if they are different transactions when it could easily have been matched. They made no effort to match them.

THE COURT: That is why I want them incorporated in front and who gains or loses by this process I haven't the slightest concern with. I do not believe that there was bad faith.

MR.PERSON: Just a no-effort attempt.

THE COURT: But I am not concerned about that right now. I am asking that it all be incorporated and if you gain by that process, fine. If they gain, I am not at all concerned at the moment with who gains what.

I just want it so I can follow it.

MR.KAPLAN: May I suggest simply that if Mr. Person has any specific complaints or questions about any of that material he can tell us about it and if there are problems we can work it out and if not we will determine that, and it would provide a basis for the receipt in evidence in any event. We get these wholesale charges which are really rather silly.

THE COURT: I am sure there are mistakes. I think yesterday we found there was one deal left out and the date we found was listed 1966 should be 1967. Those are inevitable and anybody who can contribute to any refinement or corrections on these documents should do so if everybody wants that.

2 Let's go back. We have a numbered set of Mr. Person's documents and these seem to be numbered from 1 to 91, although these numbers do not include every sheet here, do they? Does it include the last sheet? Some of the attachments haven't been numbered but, anyway, with the possible exception of not numbering the attachments we have Items 1 through 91, and I will have that marked as Court's Exhibit A for identifi-

cation, so that it is part of the record.

MR.KAPLAN: Your Honor, we have a Court Exhibit A.

THE COURT: Mark it as the plaintiffs' next number for identification.

MR. PERSON: 699, your Honor.

xx (Plaintiffs' Exhibit 699 marked for identification.)

MR. PERSON: I would like to make a motion. That is for a mistrial and also to disqualify yourself on the ground that as I found out on Friday, that the law firm, Davis, Polk, where you came from represented General Motors at the time you left the law firm. I found that out from an associate and I am really raising the issue to see if it is a valid issue.

THE COURT: I have a fairly strong memory that this was raised before in the dim distant past, but maybe not. It had been in a case that I participated in and I have a feeling it was raised here, but, in any event, the motion is denied.

The Davis, Polk law firm did some work for General Motors or General Motors directors or entities connected with General Motors at times.

I personally at one point worked on an

opinion letter on some problem in which General Motors was the client and it had nothing remotely to do with this litigation. I don't even recall when that was.

But under no circumstances was I ever involved with the representation of General Motors in any way or to any extent which would possibly prejudice me or involve any possible conflict of interest. There is simply no substance to that.

I don't trust my memory to these things, but I think my memory is such as to raise a question about whether this matter was brought up at an earlier point, but I wouldn't trust my memory at all about it.

MR.PERSON: Mr. Kaplan knows the record completely.

THE COURT: Anyway, the motion is denied.

MR.PERSON: I would like to take up a few clean-up matters.

THE COURT: Can't we get the jury in?

MR.PERSON: Before the jury comes, I want to have two witnesses come who would testify as to what a comparable business has done, two automobile brokerage firms. I want their testimony.

MR.KAPLAN: Before we leave the subject, there was something I would like to state for the record, and that is at least two years ago. I believe, we produced to the plaintiffs in this action a registration statement or other document issued by GMAC which stated on its face that the Davis, Polk firm represented some entity of General Motors. I believe the Salary and Bonus Committee.

THE COURT: I think that is right.

MR.KAPLAN: Mr. Person has that at his disposal for two years.

MR.PERSON: I have brought it up because an associate told me on Friday that he believed the firm represented GM at the time and I am merely bringing it to the Court's attention for whatever that item entails. I don't recall having read the exhibit in that respect. I probably would have brought it up earlier.

I move to have the minutes admitted for that meeting, the NADA meeting of December 14, 1966, to have it admitted for all purposes. This is the one concerning Robert Dillon, the evidence of Ruckel Pontiac attending at that meeting. This was for a limited purpose of background, and I want to move now to have it admissible for all purposes.

MR. KLEINBARD: The evidence is just hearsay as far as we are concerned. We have been all through this at a side bar.

MR. PERSON: Ruckel was a co-conspirator and therefore it is admissible to show General Motors, in other words, the contact between Mr. Dillon and Mr. McNamara necessitates showing the conspiracy of Mr. Dillon, and that is done in part with the minutes.

THE COURT: Would you like to give me the minutes?

MR. PERSON: Yes.

MR. KLEINBARD: Your Honor may recall there was a letter where there is a recital at the end of the letter that the subject matter was going to be referred to the NADA and there is absolutely nothing to indicate any action was taken either in forwarding this to the NADA --

THE COURT: I ruled on this twice, and I see no indication, there is nothing that has occurred to change the ruling. I stick to the prvious ruling.

Next point.

MR. PERSON: I have witnesses who will testify on the necessity of the fleet certificate to obtain cars through a fleet allotment, and those are Mr. Kelleher, Mr. Kemp, Mr. Moe Cerota, Mr. Davidson, David Buick, that is a new name to crop up, and I ask that I be allowed to call them for the purpose of demonstrating among things that are reflected in the affidavits of Kemp and Kelleher.

MR. KAPLAN: Your Honor, we object.

THE COURT: Were they included in the witness list?

MR.KAPLAN: Kemp and Kelleher were on the final witness list of November 4. We were in chambers and your Honor knocked them off and said that plaintiff wouldn't be permitted to call them. Nothing has changed since then.

Mr.Cerota was on the witness stand and your Honor sustained an objection to his testifying about fleet certificates, because with respect to the time period in question in this case, he was absolutely incompetent to testify. I believe the portion of the transcript starts around 1795 where he is concerned.

Finally, Mr. Davidson, I totally never heard of before, he wasn't even on the final list of November 4, and then on this last Saturday Mr. Person telephoned me with the witnesses for this week, and I specifically inquired whether there was anybody else that he wanted to call, and he did say that he was going to raise the Kemp-Kelleher matter, and he then specifically told me that there was no one else not listed on the November 4 list whom he intended to call.

That was on November 19. Now, all I can say is to avert again to what I said before, this witness list expands like an accordion.

am- 3

pgr1

THE COURT: I am sorry. I can't find my copy of the November 4 list. Can you give me a copy?

MR. KAPLAN: I have it right here.

MR. KLEINBARD: While Mr. Kaplan is looking for it, I recall one other thing with respect to the conference with respect to Kemp and Kelleher. One of the reasons your Honor denied the application was that we had not interviewed either of these people and the substantial prejudice that might result from their being called at this juncture of the trial.

THE COURT: Mr. Person, I don't have my list so I am not oriented. What are the names you are now proposing?

MR. PERSON: Kemp, Kelleher.

THE COURT: I did rule, according to my notes, I allowed certain of those witnesses, and I ruled that certain witnesses would not be presented. I think Kemp and Kelleher were among those which I ruled against, Mr. Person.

As I understand it, this list of November 4 was the first time those witnesses had been named.

MR. PERSON: No, your Honor.

MR. KLEINBARD: It's the first time they

pgr2

were named as witnesses. Mr. Person averts to the fact that they gave an affidavit in the 1973 preliminary injunction.

MR. PERSON: Page 13, pretrial brief.

MR. KAPLAN: The chronology is this: Affidavits by those people were filed in 1973. He produced subsequent to that a number of witness lists on which they did not appear. He then listed them in his pretrial brief, and we came to Court and made an application to strike from his witness list anybody who had not been listed previously.

One of the specific purposes of that application was Kemp and Kelleher. The reason we made it is because, as I adverted in chambers, Kemp has been involved in extensive litigation in the automobile industry and to prepare for them to come on as witnesses would involve an enormous amount of work. Your Honor granted the application.

THE COURT: When was that?

MR. PERSON: Kelleher has no connection with that at all.

MR. KAPLAN: I believe, your Honor, at the pretrial conference on March 22, 2976, we made that application. In fact, I'm right about it. It's at

pgr3

pages 43 to 48.

THE COURT: This related to Kemp and Kelleher?

MR. KAPLAN: 24 witnesses in the pretrial brief who had never been listed before.

THE COURT: Was there any request between that time and November 4 for the inclusion of Kemp and Kelleher?

MR. KAPLAN: No.

THE COURT: On NOvember 4 I decided to exclude Kemp and Kelleher?

MR. KAPLAN: Yes.

THE COURT: I stick to that.

What are the other witnesses you suggest?

MR. PERSON: Moe Cerota, to be able to testify to the status of the auto industry with respect to the use of fleet certificates and the fleet allotment at the current time.

THE COURT: I'll sustain an objection.

Was there a Mr. Davidson?

MR. PERSON: Top Buick dealer in the country now out of business, connected with litigation, prospective or actual, and will testify that the fleet certificate is a requirement of the fleet allotment.

THE COURT: What make of car?

MR. PERSON: Buick.

MR. KAPLAN: When?

MR. PERSON: Over the past years.

THE COURT: How many years?

Among your listing of Exhibit 699, you have two Buicks that you complain about. This was called to my attention by my clerk.

MR. PERSON: It's a GM wide problem with its fleet allotment and fleet certificate.

THE COURT: This thing about the fleet allotment and the fleet certificate, I want to defer and discuss this with you later. I cut off the reading of the deposition yesterday and that may have been improvident.

I want you, Mr. Person, to try to pull together from your notes things in the record already on this subject, and then I ask General Motors to do the same thing, and we can have a once and for all look at that subject before you rest.

I don't want to preclude you from putting on any proof that you should be able to put on, but at the same time I feel from my own vantage point that there has been a great deal of confusion engendered by you

pgr5

on this subject.

Maybe that's my fault. Maybe I have been unable to grasp valid points, but sometimes that is not the case. I have sometimes found myself able to follow trials and follow arguments. Maybe there is a lapse in this case where I'm just suddenly unable to follow valid arguments. If that's the case, I want you to coach me and get me back on the track.

But I'm being a little ironic at this point because I don't think that's the case. I think there has been a lot of confusion of trying to mix together things that are really unlike other things. I think there has been a lot of confused slipping from one type of car to another, and so forth.

But before we let the matter rest, and before you rest your case, I will take time to go over the record on that point if the lawyers will direct my attention to what is in the record.

I will hear from you as to what additional proof you want to put in. I will hear from you why, so you are not barred. You have the opportunity to bring it to my attention, and at that time we'll decide whether there is any witness, whether it's Mr. Davidson, or a further reading of Mr. Rock's

pgr6

deposition, or whatever. I don't know what is necessary. I want to have an understanding of where we stand on that subject and I don't want to just sort of go on the basis of a confused vague notion of what you are getting at.

MR. PERSON: I had prepared something already, and I presume Mr. Kaplan has as well, on that subject matter at your suggestionor direction the other day. I have tried to pull together as well as I could the references that I consider --

THE COURT: I allowed you to take the record home over the weekend. I assume you made use of it.

MR. PERSON: I did and I have a lot of references to what I consider the problem to be.

Correction on the Davidson matter: He was selling Buicks from '62 to '70. In '69 he sold 5100 new Buicks. He said that in order to get a fleet allotment you had to nave 20 cars or more registered in your name.

In effect he said you have to be a national fleet account in that list in order to have any dealer get any portion of the fleet allotment for orders for that customer. That's his testimony.

THE COURT: That's an important amendment.

pgr7

You eliminate the idea of fleet certificate.

MR. PERSON: A lot of dealers said "fleet certificate."

THE COURT: Mr. Davidson would not get up and testify that a fleet certificate was needed to get a fleet allotment?

MR. PERSON : We are saying that's a white list, to have to be on the fleet plan to get a fleet allotment, and it's illegal.

THE COURT: I'm the only person in this room that has not heard the term white list.

MR. PERSON: It's a block list but on the other side.

THE COURT: Let's get the jury in.

:MR. PERSON: May I proceed with those transcripts or are we going to wait with that?

THE COURT: I thought you were going to put Mr. Maiorana on the stand.

(Jury in box)

THE COURT: Ladies and gentlemen, I am sorry to have kept you. We are going to suspend, at least for the time being, the reading of the Rock deposition.

Before any further evidence is put in about

General Motors regarding fleet allotments and fleet certificates and so forth, I want to have the lawyers review with me the record.

As far as general procedures, I am under the impression that whatever needs to be in the record can, by and large, be stipulated. I don't think we have to read long questions and answers. I think that general procedures will be no contest.

Maybe we have enough in the record about general procedures already; maybe we don't. We want to review it before we take time to review pages and pages of further depositions.

I am saying that if Mr. Person wants to put in more evidence about general procedures, I am asking him to write up his proposal as to what he wishes to prove and he's to give it to Mr. Kaplan and Mr. Kleinbard and they will consider whether they will stipulate.

I'm adding that to what I told you about before we brought the jury in, so we can put it in a clearer and more concise form than reading depositions.

I will hand back the Rock deposition which is a little bit pulled apart. I don't know who this belongs to.

pgr9

FRANK MAIORANA recalled.

THE COURT: Mr. Maiorana is being recalled to the stand to testify, I believe, generally about the alleged damages. That is a subject which Mr. Person started to go into with Mr. Maiorana at the time he was on the stand before in somewhat general terms and we agreed to defer that. There may be other things which were agreed to be deferred.

I simply want to say that the purpose of this examination of Mr. Maiorana is not to start again his testimony. It will relate only to damages or other things deferred. I don't know that the boundary lines will be all that clear, but we'll do our best to abide by that.

Mr. Maiorana, you are still under oath.

You may proceed.

MR. PERSON: I propose to have the witness identify each dealer listed from the pretrial brief listed in the front which subsequent to Mr. Maiorana's meeting with Mr. Belcher and the refusal of the fleet certificate in early 1968, the declination to do business with Nabcor where there was a claim that there was a need for a fleet certificate.

MR. KLEINBARD: I object, your Honor. May we see you at the side bar.

THE COURT: All right.

(At the bench)

MR. KLEINBARD: As I understand it, your Honor, in the first place I would appreciate it if Mr. Peron would not make these statements to the jury as to what Mr. Maiorana is going to prove before we get a chance to talk to you or before we get a chance to object.

In the second place, I think we have been through this before and we submitted a brief to your Honor that this witness' testimony as to refusals to deal, for whatever reason, is not competent, it's not relevant, it's hearsay, and to the extent it would be relevant it's relevance is outweighed by its prejudice to us. This goes back to the 30 order dealer situation that we discussed with you some days ago.

At the outset of the trial he was proposing to go into Colonial Cadillac and then 30 other refusals to deal. He can't do that without involving himself in hearsay, because the reasons why the dealers refused to deal are so diverse, assuming they did refuse to deal, there is no connection to General Motors which makes it irrelevant.

Even if there were a connection if an inference could be drawn its prejudice outweighs its relevance.

THE COURT: This is a matter we put off. Let me try to list the problems.

We know enough now to realize that if a dealer refuses to sell there may be any one of many, many reasons. It may be that the dealer does not want to sell at this low a price.

It may be that he doesn't want the competition of Nabcor.

It may be that he is not convinced that Nabcor could take all the cars that are suggested, the 200 to 400 cars.

It may be that the dealer is not going to make efforts to get that quantity of cars because he doesn't believe that Nabcor has the ability to get them.

It may be that he does not believe that Nabcor is financially responsible.

It may be that anyone of many other factors occurred.

In other words, it may be, as an initial proposition, that the reason was conspiratorial activity either with other dealers or with General Motors, but the latter reasons are only one or two possible reasons out of a great many.

I am also convinced in this case, having heard the testimony of a number of witnesses, including the present witness, that the kind of generalizations which are elicited by Mr. Person on direct when probed on cross turn out to present vastly different pictures in most cases.

In other words, these kind of general seeeps without the details of exactly what went on when, what the setting was, those general sweeps are generally totally misleading.

MR. PERSON: That's only because you are accepting the other side's evidence.

THE COURT: I'm accepting their own testimony on cross-examination in most cases, but in any event, regardless of whether it turns out to be favorable to the plaintiffs' side or the defense side, in each case, it seems to me, application for cars is a separate individual situation which, if it's going to be developed at all well, has to be probed individually.

Where that has been done generally in this trial a great deal of light has been shed on the matter.

Where it has not been done, where it can't be done because of a lack of memory or a lack of documents, then we are left somewhat in the dark; and it has not always been done and it has not always been able to be done.

But my general proposition is that the sweep of listing 30 dealers where they refused, I just have a deep distrust based on experience in this case for that kind of evidence.

MR. PERSON: We have two types, your Honor. May I help you along? One is the refusals that Occurred initially without any activities between the two companies other than that refusal. That's one category of refusal.

The other kind is where they had actually begun to deal with Nabcor and subsequently refused.

What I wanted to do was to merely be able to identify for purposes of establishing damages that there were instances subsequent to these conversations with Belcher and Karney where Nabcor had been rebuffed with the reasons stated of a fleet certificate, and to stop at that point, not to try to go into --

THE COURT: How many instances?

MR. PERSON: Probably 20 or 30.

THE COURT: Do these relate to your claims of refusals that are in 699 for identification?

MR. PERSON: Some do, yes.

THE COURT: What does it have to do with damages?

MR. PERSON: We claim that General Motors had the duty of curing the problem that had developed where the requirement of using the fleet certificate was concerned.

THE COURT: Is this an antitrust violation?

MR. PERSON: If they set up this procedure for distribution and it has interfered with our sources of supply, we claim it is an antitrust violation and we brought it to their attention.

THE COURT: In other words, a dealer makes a mistake? The fact is, as I understand it, there is no fleet certificate requirement to buy cars.

MR. PERSON: GM maintains that but the dealers believe otherwise.

THE COURT: I think you have stipulated to that.

MR. KAPLAN: Yes.

MR. PERSON: Only what the fleet certificate states, not what happened.

THE COURT: I think the record would

demonstrate conclusively that if a dealer was saying to Nabcor "You have to have a fleet certificate to buy," that dealer was mistaken. I think there is a stipulation which demonstrates that.

MR. KAPLAN: I believe there is, your Honor.

MR. PERSON: Your Honor, this is important because everything else depends on this. At the very beginning there was a question as to what the fleet certificate said. What it says is set forth in writing and we agreed to what it says in writing.

This is really, to a great extent, what the trial is about, the fact that they used something so apparently innocuous as a marketing device as a means of regulating who gets cars and who doesn't.

We brought this to the attention of the highest official we could find and all they did was deny us a fleet certificate rather than to cure the problem. I want to show that subsequent to that the problem continued.

MR. KAPLAN: They got 80 to 90 per cent of the cars they ever wanted.

THE COURT: What was the problem? If they were able before the Belcher talk to walk in and buy a car, the dealer in that case was not requiring a fleet certificate to sell. You show me instances among your ones in 699 for identification where you were complaining about the -ailure to deal and where that was used as a reason. That might conceivably relate to damages.

MR. PERSON: Colonial Cadillac admits that you had to have a fleet allotment in order to be able to get cars otherwise it would come out of their resale allotment.

MR. KAPLAN: There is a stipulation flatly contrary to that. It was stipulated and testified to that at least two thirds of the sales made to leasing companies and regular companies came out of rental allotments. It's all in the record.

THE COURT: I think as an initial proposition, I voiced this before, that circumstantial evidence of conspiratorial activity by GM, one can certainly conceive the relevance of testimony that 30, 40 lots of GM dealers, refused to deal. I deferred this matter because of the problems you raised.

Let me ask you this: Your proposition is to have him give the names of 20 or 30 dealers who refused to deal with him because they said he had to have a fleet certificate?

MR. PERSON: Yes.

THE COURT: Are you saying these were instances where he went in with orders for specific cars?

MR. PERSON: Usually they had dealt with us. Usually they had dealt and this was a period near the end.

THE COURT: These were cutoffs?

MR. PERSON: The term cutoff -- most of them cutoff in a sense. They had been dealing with us and then declined to deal any further giving that as a ground and in instances at the very outset -- I didn't categorize the ones where they said "No, we don't want to deal with you."

THE COURT: Is he going to testify about Luby, for instance?

MR. PERSON: Yes.

THE COURT: He's going to say that Luby all of a sudden said to him you have to have a fleet certificate?

MR. PERSON: Yes. What that means is that the fleet allotment was being brought to the attention of the dealer and then he realized he had to take sales out of his retail sales. That's the thrust of this.

MR. KAPLAN: That's a brand new thrust.

MR. PERSON: No. It's all in depositions, taking the fleet allotment -- in other words, the dealers were willing to deal with us at the outset.

THE COURT: Did this lead to any action?

Really, Mr. Person, if you are introducing this evidence to show --

MR. PERSON: It led to the action of a chain of new dealers.

THE COURT: What are you trying to prove by this? I have the problem of hearsay evidence rule. I am trying to see if this is strictly a hearsay use or if it's a non-hearsay use.

If you would be rigorous in your analysis, what are you trying to prove from this evidence?

MR. PERSON: That we were damaged by the necessity --

THE COURT: No, no. Are you trying to prove that as a fact the dealers thought that fleet certificates were required? Are you trying to prove that?

MR. PERSON: Yes.

THE COURT: In other words, you wantto

have Mr. Maiorrna testify that somebody said a fleet certificate was required in order to prove the fact that the dealer thought it was required?

MR. PERSON: Correct.

THE COURT: Are you also trying to prove the fact that General Motors was telling them that a fleet certificate was required?

MR. PERSON: That would have to be something that the jury would be able to conclude but we are not trying --

THE COURT: You believe the jury could conclude that?

MR. PERSON: With all the evidence in the case.

THE COURT: Then you would argue to the jury that they could conclude that? Well, I could be wrong, but it seems to me that is strictly a hearsay use.

MR. PERSON: Damages as well. In fact we were damaged --

MR. KLEINBARD: We went through this before.

THE COURT: I don't wantto talk to you about damages --

MR. PERSON: We had to go from one dealer to another.

THE COURT: You can prove that. If you want to have Mr. Maiorana tell the story that he had to go from Luby to Matt Slap, he can testify to that.

MR. PERSON: For what reason? We tried to cure the problem of the fleet certificate and it didn't work.

THE COURT: Presumably you have already proved the reason.

You put on your case on liability.

I don't know what we have here in the bench conference. We have not had any actual questions.

I'm going to rule I will not permit Mr. Maiorana to testify about statements made to him by dealers about refusing to deal because of a lack of fleet certificate where you are attempting to prove that in fact the dealer thought that a fleet certificate was necessary or where you wantto have the jury infer from that that the General Motors was telling the dealers that a fleet certificate was necessary; so since that's the only proposed use --

MR. PERSON: The damage use that we had to go from one dealer to another?

THE COURT: That doesn't help in an

analysis. I will rule as far as what you have told me about the intended use and, I will not permit you to elicit that testimony.

Let's go.

(In open court)

DIRECT EXAMINATION

BY MR. PERSON:

Q When was your meeting with Mr. Belcher, the staff assistant to the president or the chairman of the board of General Motors?

A What was it?

Q When was that meeting?

A In the middle of December, approximately the 15th of December, I believe it was.

Q That was in what year?

A 1967.

Q Following that you had two meetings with a Mr. Karney, is that correct?

A Yes.

Q When did those meetings take place?

A I believe one was on the 3rd of January and one was later on in the month.

Q I think your testimony is that you had told them that Nabcor was unable to purchase cars prior to the dates you talked with them for some reason. Could you tell me what that reason was?

MR. KLEINBARD: I object. He's summarizing the testimony. I object to his summary of the testimony. Whatever he has testified to he has testified to. In addition to which I think he's in error.

THE COURT: I sustain the objection. I don't think you can lead your witness now any more than you could then. If you have an accurate statement of what he testified to, you can read that to him and then ask him a question. Obviously you have to follow up, but you have to be careful about summaries.

Ask a question and the record will show what it shows.

Q Did you have any discussion with Mr. Belcher concerning any statements any dealers made to you?

A Yes.

Q Could you state what it is that you had told Mr. Belcher concerning these statements?

THE COURT: Look, Mr. Person, I am not going to have his direct testimony repeated. This was a subject that was asked him, indeed it was asked him and then it was brought up again.

We are going to have immense confusion

if you go into again what you have already asked him. The purpose of this inquiry now is to ask him questions different from what were asked him before, and if you want to orient the witness or orient the jury, you can read from the record what was given as a basis for showing what your question is about, but the questions have to be new questions.

Q I'm reading from a letter sent by Mr. Maiorana to Mr. Karney dated February 7, 1968.

THE COURT: . What exhibit is that?

(Pause.)

THE COURT: It is Exhibit 356.

MR. PERSON: Reading from the second paragraph:

"I would like to call to your attention that the question of Nabcor obtaining a fleet certificate was a result of my conversation with Mr. Belcher. Mr. Belcher agreed with me that obtaining such a certificate might correct the situation created by the General Motors employees in the Buffalo area."

BY MR. PERSON:

Q Was that subsequent to the date of your letter of February 7, 1968, did Nabcor experience any additional problems concerning a fleet certificate?

A Yes.

Q With whom did any problems arise?

MR. KLEINBARD: I object to that, your Honor. I wish to object to this and he is going to elicit the same substance he testified to.

THE COURT; Sustained. It isn't a matter of telling about problems experienced. There are admissible pieces of evidence that he can testify to, it is not his opinion.

We know enough at this point to know exactly what he can testify to, whether that testimony will be admissible, and what is beyond his ability to testify, he would have to call other witnesses. We know all about that now.

MR. PERSON: May he be permitted to testify to his side of the conversation?

MR.KLEINBARD: Your Honor, we already discussed again at another time the problems that happen when we have the so-called one side of the conversation.

If I can approach the bench -- I don't like to keep approaching the bench, but I have no choice.

THE COURT: I thought when we were at the bench before we got the ruling. Come up again.

(At the side bar.)

MR. KLEINBARD: Your Honor, in addition to what we already said at our last conference at the side bar,we had another conference at the side bar after Mr. Maiorana was permitted to testify to the so-called one-sided conversation.

Your Honor regarded it at that time as a very unsatisfactory way to proceed and the reasonwas, among others, that he can as alleged telling his conversation give both sides of the conversation, and I know that is going to happen again.

This man cannot testify as to the kind of things thus far put to him without involving either hearsay or irrelevant testimony.

THE COURT: Are you now purporting to go into the question of damages?

MR. PERSON: I am going to, your Honor. I am going into, he will be able to have him identify the dealers that originally after the meeting had agreed to sell and subsequently did not. That is, had refused to sell after they agreed to sell.

MR. KAPLAN: That is liability, not damages.

THE COURT: Just a minute. I asked you if your intention is to go into the question of damages.

MR. PERSON: Yes.

THE COURT: Because it makes a difference to me.

MR. PERSON: Yes, I am going to the question of damages. This is added activity that cost money on Nabcor's part, cost of overhead, time of management, and it costs money. It resulted in the change in the transactions.

THE COURT: Look, Mr. Person, you have materials available to you in the records of Nabcor and in the summaries of General Motors and so forth, but you have material available to you which show what dealers terminated and what changes were made in dealers.

Now, it seems to me that if you want to take specific situations, and I am talking about damages now, and that is what you are telling me you are going into, if you want to have Mr. Maiorana say that "Up to a certain point I was dealing with Luby Chevrolet and that after a certain point Luby wouldn't sell me any more cars and I had to switch to Matt Slap or A.C. Chevrolet and here is the losses that I suffered, I had to spend X amount of dollars to make this change, I had other damages, whatever they would be," he can certainly testify to that.

But that isn't what you are doing --

MR.PERSON: I was trying to relate it to some of these refusals to the period following his meeting with Mr. Belcher and Mr. Karney, to show that the problem was not cured by his --

THE COURT: We can't seem to ever get on what I regard as a sensible basis.

Now, I don't pretend that liability and damages are easy to cut apart and separate.

But the fact is, Mr.Person, that you had

Mr. Maiorana on the stand for direct testimony and he was cross-examined and there were certain specific things that were held in abeyance and the record shows those things.

One of them was the subject of damages. I want to keep reminding you there were other specific things like Colonial Cadillac that might relate to liability that were also left in abeyance. There may be things beyond Colonial Cadillac.

I don't want to preclude you from introducing evidence through this witness on anything where the record shows you are entitled to it. But it is up to you to search the record and be precise on exactly what it is you are entitled to examine him on.

Right now you are saying to me you are going into the question of damages. Again, I repeat for the umpteenth time -- I don't know that that is the end of what you are entitled to go into, but let's just take the subject of damages for the moment, because that is what you are saying you are examining him about.

Now, the question of the reason for a dealer refusing to deal relates to what I would call liability and if you have proven that the dealer refused to deal or cut Nabcor off for an unlawful reason, a reason for which General Motors is responsible, then that presumably would make your case for liability.

Now, the damages flowing from that cut-off or that refusal to deal is the subject of damages. So the question is no longer why did the dealer cut Nabcor off, it is what damages did the cut-off result in, and I don't know if it is a simple question,but it is at least a clearcut separable inquiry and would involve questions like having Mr. Maiorana bring out that at a certain point he was no longer able to get cars from Luby and this caused me to expend money on X,Y,Z which resulted in damages.

That is my idea of damage evidence. It has nothing whatever to do with the reason why they cut off, that shows liability. I said the same thing about 17 times and we go on and on.

I think we have to begin to have some testimony. Are you prepared to go forward on having testimony?

MR.PERSON: Yes.

THE COURT: Specifically about damages, or aren't you?

MR. PERSON: Yes.

THE COURT: Let's go and do it.

MR. KLEINBARD: Can I just add one thing while we are up here?

It just seems to me that to have this kind of evidence which is basically documentary in nature, and that this witness can sit on the witness stand and allegedly say that it cost him X dollars to do this or that, it really isn't going to be very helpful either to the Court or the jury certainly.

THE COURT: I can't see that at this point, but the problem is --

MR.KLEINBARD: I am not opposing it, I think it ought to be presented in some kind of written form, where it can relate to the books. His oral explanation now as to what it cost him back in 1967 to move from A to B is highly unreliable, your Honor.

THE COURT: Let me just say this, that in the specification of damages produced on November 7 for the Sunday night conference, there was a list of damages claimed by Nabcor, the expenses resulting from transition from one dealer to another;

The expenses, do they appear anywhere in this listing I am handing to you now? Yes or no?

MR.PERSON: I am trying to see which are the ones.

There is the expenditure of -- at least, the first two items, capital contribution by Frank Maiorana of $27,000 and loss of income actually received from franchise sales net of selling expense during the period 1967 through 1970.

THE COURT: Have you ever mentioned that item of damages?

MR. KAPLAN: No. In fact, when interrogatories were served after pre-trial with you, and not in answers to those or this Court.

THE COURT: The expense of transition.

MR. PERSON: We are claiming total destruction of the business.

MR. KLEINBARD: It is impossible within the damage period. You had the best year at the end.

THE COURT: I am talking of the transition, have you ever articulated that and, Mr. Person, I understand the English language and I never heard it from you. I think it is separable -- the kind of thing --

MR. PERSON: It is included within the amounts that were spent.

THE COURT: Capital contribution and loss of income is not in the plain meaning of the English language, would not be embraced in this kind of claim.

MR.PERSON: That relates to money received. Money actually in the till.

THE COURT: The problem is,this is probably something that has never been articulated until this moment. It is something which General Motors has never had any opportunity to deal with in examining Nabcor's books.

It is probably not anything that they ever had any notice to go into on deposition,it is nothing which we talked about in our discussion of damages, and now we have somebody getting on the stand and reeling off a list of expenses.

MR. PERSON: Your Honor, in answer to interrogatories a long time ago,and I have those back here, you wanted us to detail how we were affected and I served an answer to interrogatories in Schedule A, and that detailed the different types of expenses that we had to meet, the added costs as a result of this illegal activity.

THE COURT: Where is that?

MR. KAPLAN: It is right here,and it doesn't include that claim.

MR. PERSON: That isn't it, your Honor.

THE COURT: One second.

(In open court.)

THE COURT: Ladies and gentlemen, you may take your break now, and I am very sorry.

(Jury left the courtroom.)

MR.PERSON: Here it is.

MR.KAPLAN: That is something else altogether.

THE COURT: Where is it that the damages are specified in the answers to interrogatories? Just give it to me.

MR. KAPLAN: This whole bunch here at this tab, and it is Answer No. 1, fourth set. Here is the summary sheet.

THE COURT: It says, "Damages of Nabcor Recapitulation," and has a"Schedule 1, Loss of Income Direct, New Car Transactions, 405,000," and that corresponds to this $485,000 figure in the schedule produced November 7.

MR. KAPLAN: I don't believe so, your Honor.

THE COURT: You don't?

MR.KAPLAN: It corresponds to the $178,000 figure on page 2 of Exhibit A.

THE COURT: Anyway, it does not include any claim which would be recognizable about expenses of making a transition from one dealer to another.

Now, I am looking at this recapitulation and list, and let's identify it for the record. This is answers to interrogatories dated when?

MR.KAPLAN: I think it is on the front page, your Honor.

THE COURT: The date of the interrogatory would be December 31, 1974. The date of the answer sworn to by Anthony Maiorana and notarized by Carl Person is April 21, 1975, and indeed was signed by Mr. Person April 21, 1975, and notarized by Frank Maiorana.

I am looking down at these items. There is nothing here, nor is there anything in the list of items given to me on November 7, which articulates any claim about expenses involved in transition.

MR.PERSON: We are claiming destruction of the business, and this was the measure of damages for the destruction of the business.

THE COURT: It isn't the same thing.

MR.PERSON: To be able to show the business is destroyed.

THE COURT: If you want to claim that the business was destroyed, there are ways of proving that, but it isn't a matter of --

MR.PERSON: It is financial impairment.

These added things Nabcor had to do made it financially unable to continue, so that I have got to show these damages that brought Nabcor to the level where it couldn't operate and there was a destruction of the business.

MR.KAPLAN: The simple answer to that is on December 10, 1970, which is the last date of the damage period, Nabcor was in business and just had its most profitable year and was in business for two more --

MR. PERSON: That is selling franchises. That is non-recurrent income.

MR. KAPLAN: The business was not destroyed during the damage period nor in the two years following the damage period.

THE COURT: You are saying his costs. What you are saying is costs were increased as a result of the conspiratorial activities, so that this contributed to the destruction of the business that occurred in 1973.

Now, there is a legitimate problem. If you have a cutoff date of December 10, 1970, and he hasn't filed any supplemental complaint and I don't have it here to try, but I suppose that it might be open for somebody to try to prove that prior to December 10, 1970, the business was so impaired that the pre-December 10, 1970, activity was responsible for the ultimate demise of the business.

It is hard to conceive of in this setting, in a setting where maybe things were just frozen, it was dormant.

The business was basically over with and then all that occurred three years later was the filing of a bankruptcy petition or dissolution. That you could conceive of.

Here it is very difficult to conceive of and it seems to me the question here is what damages had been sustained as of December 10, 1970. That might be slightly to narrow a definition because again maybe there were -- I am interrupting myself -- I don't think it is too narrow.

I think that even in the case where you have business which has been rendered inactive and still was on the books and maybe a dissolution three years later, the question is what damages had been inflicted by December 10, 1970. That is when the pleading is and that is when the complaint is.

I think you can prove damages as of December 10, 1970. I don't mean you can prove it, I think the arguments are available to you.

In other words,if you can put on the evidence about the financial status of the company as of December 10, 1970, you can put on evidence about their profits or losses during the period we are talking about ending December 10, 1970.

You can put on evidence about the assets, liabilities, net worth or deficit or whatever existed as of December 10, 1970.

But the business was still going and it would be a little hard to put on evidence about the destruction of business when the business hadn't been destroyed as of then.

If a witness can get on the stand, whether Mr. Maiorana or an accountant, and say, "Okay, as of December 10, 1970, this business had a negative net worth, it was experiencing losses, it only had a value of X dollars or the value was zero," I suppose subject to hearing from the lawyers -- I am just thinking out loud basically -- I suppose that proof would be competent and would be within the issues within this case.

But it would have to be an evaluation of the business taking into account the situation of the business as at and before December 10, 1970.

What evidence do you propose on that?

MR.PERSON: That the financial statements show non-recurrent income and that the true operational aspect of the business were very close to zero. That is, they didn't have very much of the kind of business and not enough to sustain itself so that the business as a business was not worth anything at that time.

THE COURT: Wait a minute, let me just follow that. Of course, you have an extremely important issue about causation.

Has Mr. Maiorana analyzed the story about what cars were obtained and what cars weren't obtained? I am not sure you really have. I am not sure Mr. Maiorana has.

Because if he is going to get on the stand and testify that -- I know who would testify -- but if somebody is going to testify or argue that the financial condition as of December 10, 1970, is the result of some causal factor, what is the causal factor that he is going to say it is a result of?

MR. PERSON: Added expenses incurred in contending with problems that arose and inability as a result of the deployment of the resources of the company to curing the problems, to be able to build the business. So that there was interference with the business as a result of these activities.

THE COURT: Added expense --

MR. PERSON: And deployment of resources.

THE COURT: But not the failure to receive cars but added expenses.

MR. PERSON: Everything that occurred is added expense and it takes away the time of management and the result is that the business is not allowed to do its business but instead is coping with the problems that arise and make it unprofitable as a business.

MR. KLEINBARD: May I be heard for a moment?

I think when you get away from rhetoric and look at the figures --

MR. PERSON: It is non-recurrent income.

MR.KLEINBARD: Just take a look at these statements.

MR. PERSON: You are smart enough to know that.

MR.KLEINBARD: And this is the offering circular. Quite apart from the problem of showing why automobile sales were at any particular figure, and I may remind your Honor as in the exhibits that we have submitted to you, the percentage of deliveries to orders increases as the years go on rather than declines.

You would expect to find if what Mr. Person is saying is correct, that the selling and general administrative expenses then would go way up. In fact, they go down.

MR.PERSON: Showing a lack of capital.

MR. KLEINBARD: And the difference between automobile sales and franchise income, you see in 1971 automobile sales almost three times what the franchise income is.

MR.PERSON: Multiplied by $50, the number of cars.

MR.KLEINBARD: Those are the figures and that is my objection to the witness's testimony. He is just sitting there talking about something without reference to specific figures, and it is highly prejudicial to us. Whenever we go into the figures it is contrary to what we hear.

If he wants to answer based on the books and records and then testify as to what the books and records show, that is a different story.

But I just don't see how he can be allowed to sit here on an issue and testify when we have these figures in the record and just speculate on what it cost him. We really have no way of telling apart from the books and records,and it is nine years ago and the statement doesn't bear him out.

MR. PERSON: Our accountants wrote off $250,000 worth of notes, your Honor.

MR. KLEINBARD: We went through that on Mr. Maiorana's cross-examination and showed there weren't any such notes on the books, your Honor. I remember that distinctly. As a matter of fact, you asked the questions at one point on the amount of cash and the amount of notes on hand.

THE COURT: The thing that complicates it is this: that if you had a situation where there was a substantial number of orders coming in from brokers which could not be filled, then that would be a fairly clear situation.

You would have the losses accruing from those unfilled orders and how that would be calculated, you would have to worry about that, what the net profit to Nabcor would be, your profits or other profits involved. But at least let's suppose that all of the orders they tried to fill in 1970 were denied them and they couldn't fill an order. There you would have a clearcut situation, you would have your lost profits on those orders. Presumably you would have no automobile income, you would have no automobile profits that year and one could with some reasonable reliability probably trace what happened as a result, in different directions.

If the business changed it changed and the causation would be reasonably clear. But here where you have such a great proportion of all autos ordered received, that were in fact filled, we are all left with trying to grope for some damage theory which is just very difficult to conceive of because probably it just isn't there.

The thing is, the crucial thing I come back to is what I said earlier on causation. I start with what orders are coming in from the field?

What orders are coming in to Nabcor from its brokers?

Now, if they send in X number of orders in the year ending December 10, 1970, and I know that isn't the fiscal year but we are talking about that year --

MR. KLEINBARD: It is close enough.

4 THE COURT: If they send in X number of orders and suppose all the orders were filled or filled but for

a smaller number. Then, still maybe Nabcor doesn't do very well, they might suffer a loss, they might suffer low profits or might have very high overhead in proportion to the business and so forth.

But just as an initial proposition, the main reason is, it would seem to me, relates to two things:

Either the orders aren't coming in in sufficient volume or they have too high an overhead for that volume of business.

Insofar as the orders are insufficient to general enough business to generate enough volume to provide the desired profit, then that is the problem with the number of orders.

But if Nabcor filled all orders that came in, it is very difficult to assign to General Motors or to the conspiracy the loss in profitability as far as that factor, that factor being the number of incoming orders.

Now, insofar as the overhead is concerned, whether you call it that or some other item of cost, if the conspiratorial activity has resulted in an excess of costs, of one kind or another, whether called overhead o cost of sales, whatever, it seems to me that as of December 10, 1970, in the situation we have here, I can't say that that cost made the business worth zero, but you certainly wouldn't start there, you would start with trying to isolate what the amount of cars cost related to the problem. That would take some very fancy analysis.

(Pause)

You should try to figure out what excessive costs there were which stem from the alleged conspiracy, which stem from the need to move around from dealer to dealer, write more letters, make more telephone calls, and so forth.

MR. PERSON: Losing brokers reduces your distribution system.

THE COURT: But, my friend, that gets back to something else. You have to demonstrate some losing brokers to me because if you have most of the brokers' orders filled -- that is the thing that the brokers are seeking -- and if orders can be filled that's the basic thing they are wanting.

As far as the training program and all, we heard some awfully vivid testimony from Bolling and Strimple to the fact that they didn't know much about any training program. They never got trained.

MR. PERSON: Mr. Strimple was an expert in the automobile bueinsss.

THE COURT: Who else needed training?

My point is that as far as the loss of brokers, I think you would have a far simpler case about loss of brokers if you could show more of those brokers' orders unfilled. What damages flowed from the loss of brokers?

MR. PERSON: It prevents volume from developing. It prevents referral business from developing. It creates problems in terms of dealing with the broker.

THE COURT: Mr. Person, this would take some close analysis and some precise testimony about what brokers were lost and why. Are you prepared to present such evidence?

MR. PERSON: Mr. Maiorana knows a lot of those brokers and we can have him --

THE COURT: Have you interviewed Mr. Maiorana and found out precisely what he's prepared to say about the lost of brokers and the reasons why they were lost?

MR. PERSON: We talked about this at length and went over a whole list of brokers.

THE COURT: You have brokers who were lost because of the inability to fill their orders.

MR. PERSON: That and other problems as well.

THE COURT: What other problems?

MR. PERSON: That was the essential problem.

I'm trying to think of what some other things --

THE COURT: What broker was lost because of the inability to fill his orders? Name me one?

MR. PERSON: SMC, for example.

THE COURT: Where is SMC located?

MR. PERSON: Philadelphia.

THE COURT: What caused him to be lost? SMC is listed in this General Motors summary, and he has no orders listed in the log whatever. Did he ever place an order with Nabcor?

MR. PERSON: Many.

THE COURT: They're not listed inthe log.

MR. PERSON: Yes.

THE COURT: Where?

MR. PERSON: Here's all the orders from Simpson.

THE COURT: Stanley Simpson, SMC Auto Sales.

MR. KAPLAN· What isthe last date on that?

MR. PERSON: These are photocopies of every line in the log that relates to SMC or Simpson. It's a '66 document.

MR. KAPLAN: That's why it's not inhere, your Honor.

THE COURT: What are the dates referred to?

MR. PERSON: 7/66.

MR. KAPLAN: He's out of the time period, your Honor.

THE COURT: When was he lost?

MR. PERSON: In this case, yes.

THE COURT: Did he resign when you say he was lost? Did he resign or terminate?

MR. PERSON: They don't deal any more. I have not seen a letter from him. In this particular case the appearance from the entries for him is that there were no more orders after 11/14/66.

THE COURT: That's barred by the statute of limitations. Let's get inside the statute of limitations.

Do you have any examples of brokers lost because of refusals or failures to supply cars committed within the statute of limitations?

MR. PERSON: Augustine Motors, for example.

MR. KAPLAN: Page 2, your Honor.

MR. PERSON: He was in New Rochelle, New York. The agreement was signed in September '66.

THE COURT: The log reflects, at least within the damage period, according to the General Motors summary, 24 orders in the log.

MR. PERSON: I have 40 minus 3.

THE COURT: What do you mean by 3?

MR. PERSON: I have three orders that were received and acted upon before the beginning of the four-year period. Subsequent to that the first one is the fourth order and that was delivered 12/13/66. From that time until 5/15/68 -- and I think it's 1968, since I don't have the year -- there were an additional 37 orders.

THE COURT: In the log?

MR. PERSON: Yes.

THE COURT: The General Motors summary is sure way off.

MR. KLEINBARD: Are you including non-General Motors' cars as well?

MR. PERSON: That's where the discrepancy comes in.

THE COURT: There were only four non-General Motors' cars, according to their summary.

MR. PERSON: Mine is accurate. I can't vouch for theirs.

THE COURT: I want to limit it to General Motors.

MR. PERSON: You can verify my figures

because they're all consecutive order numbers, so the whole thing runs consecutively.

THE COURT: You have got certain failures to deliver. Are they reflected in your exhibit 699 for identification?

MR. PERSON: Yes.

THE COURT: How many?

MR. PERSON: 11.

THE COURT: Are they Cadillacs or what?

MR. PERSON: 149 was a Cadillac. 216 was a Cadillac. 217 was a Cadillac. 218 was a Cadillac. 220 was a Cadillac. 221 was also a Cadillac.

MR. KAPLAN: All before the time period.

MR. PERSON: No, no.

MR. KLEINBARD: 232 is 12/29/66.

MR. PERSON: That's within the time frame.

MR. KLEINBARD: The other ones recited --

MR. PERSON: 12/13/66, 12/12. You are wrong, Mr. Kleinbard.

MR. KAPLAN: You have any number of dates in your log.

MR. PERSON: The only date that's in the log --

MR. KAPLAN: This is based on the date the order was received by Nabcor.

MR. PERSON: The problem is that the order was on file and active prior to the beginning of the four-year period.

THE COURT: In Mr. Person's sheets in 699 for identification I just found these quickly. There are maybe others, but there are order numbers that relate to Augustine, 216, 217, 218.

MR. PERSON: 149.

THE COURT: 220, 221 and then you say 149?

MR. PERSON: Now jump to 232.

THE COURT: Go back to 149. 149, 216, 217, 218, 220, 221, are all Colonial Cadillac cars. Then you say jump to what?

MR. PERSON: 232.

MR. KLEINBARD: Also Colonial.

THE COURT: 233 is Colonial Cadillac, as is 234?

MR. PERSON: 246 likewise.

THE COURT: Yes.

MR. PERSON: Then he tried to change his luck with a Pontiac at 315, and that didn't work out for him.

MR. KLEINBARD: It didn't work out for two cars ordered on the same day.

THE COURT: What number? 315 he tried on a Pontiac.

MR. PERSON: That's the one in question and not 314.

THE COURT: All right, 315.

Is that the end as far as Augustine?

MR. KLEINBARD: No, your Honor.

MR. PERSON: Yes, it is, in terms of what we are complaining about.

MR. KLEINBARD: The fact of the matter is that he received a whole bunch of cars after that date. It's hard to draw a conclusion.

THE COURT: Take Augustine. It seems to me that a competent witness could testify to this. The Colonial Cadillac thing is so murky right now, but let's assume for the moment there was enough evidence to raise an issue about the Colonial Cadillac transaction. It seems to me that a witness could testify, whether it was Mr. Augustine or who it would be.-- but somebody could testify, a competent witness, that he had such bad fortune, he was unable to get cars in so many of his transactions, that he had to drop out of business.

That would depend on some particular facts about chronology and all of that thing, but I'm stating it in the most general terms. If a witness knew facts of that general nature and he knew the details back of them I guess he could testify.

So we have one example which presumably -- maybe there is a talking point.

Do you have anybody beside Augustine in the same category?

MR. KLEINBARD: Before you leave Augustine, look at this. I don't know if it's the same as Mr. Person's. It does not commence with the period before the statute but I don't see how you can draw any general conclusions --

THE COURT: I'm not saying I would draw conclusions.

MR. KLEINBARD: Hypothetically there are some brokers that might be able to come in. This witness cannot give us the experience of any particular broker except by hearsay of the wildest kind. That's the difficulty with this type of proof. It's a little late in the game to be facing it.

The only appropriate way to find out what happened, let's assume we're talking about Augustine and find out whether he made sufficient efforts, whether he devoted his full time, the whole picture that we have had time and time again; even on Cadillacs this record shows he got a Cadillac late in the dates. It's hard to say he stopped doing business because he didn't get Colonial Cadillacs.

THE COURT: It keeps coming back to the same thing. In our exploration of Mr. Augustine's situation, the question is what orders did he give to Nabcor and what happened to those orders?

As we have seen, there are certain items in your sheets, in 699 for identification, that relate to Augustine, so the question is whether those instances of inability to obtain cars mainly from Colonial Cadillac are assignable to General Motors and, if so, what the damages flowing therefrom are, or what did it cost Nabcor in any reasonable chain of causation?

We really do not have in my view -- are you going to put on any more evidence about Colonial Cadillac? They remain a kind of feature here --

MR. KLEINBARD: It accounts for almost half, your Honor. It's almost half the cancelled orders.

THE COURT: It's more than half.

Maybe that's one way to approach this. What are you going to do about Colonial?

MR. PERSON: Mr. Maiorana can testify to the Colonial Cadillac situation?

MR. KLEINBARD: I'm at a loss to say what he could say about Colonial. We had Mr. Murray on the stand. There is no reason why he could not have been examined.

THE COURT: Mr.Maiorana, I do think, can testify,subject to cross-examination, as to orders that were placed. That he's competent to testify about presumably or somebody in his organization's competence.

MR. KLEINBARD: That's another difficulty, as to how many he actually attended to by himself or how many were handled by other people who have not testified.

THE COURT: I think by the end of the first day -- we can review that. I think at the end of the first day that was deferred. I don't think he had a chance to go on and even testify as to anything within his knowledge. At least it seems to me you are entitled, as the record now stands, to pursue the Colnnial Cadillac matter further.

Why don't we do that? At least that's something that has to be wound up and you intend to wind that up. Let's assume you have finished with your evidence on Colonial Cadillac.

How are you going to prove what happened with Augustine? Is it your contention that just stopped functioning at a certain point?

MR. PERSON: I'm going to go over each of the brokers with the witness and let him explain what he knows about events that occurred to them as a result of dealings with Nabcor, and to ultimately testify that they're no longer dealing with Nabcor, that they're no longer a franchisee, and the specific date at which the last order was received by them.

THE COURT: According to this thing that General Motors has just given me, they have one of these charts about Augustine Motors brokerage. There were sales by Nabcor to Augustine --

MR. KLEINBARD: Right after the alleged refusals.

THE COURT: Let me finish: Up through at least March -- I guess it's through the middle of March, 1969. What is the contention? That he ceased business at that point?

MR. PERSON: Every broker ultimately went out of business and was no longer a Nabcor franchisee, and various things happened between Nabcor and each of the franchisees, so I would have the witness testify what happened with respect to the varous brokers individually.

THE COURT: What does he know about that?

MR. PERSON: He has had dealings with them. Some of the brokers sued Nabcor. Other brokers terminated very quickly. Others remained for a longer period.

THE COURT: Mr. Person, you must have some specific idea. You must have some claim about whether brokers went under or quit.

MR. PERSON: They all did.

THE COURT: Because of the alleged wrongdoing of General Motors. Anybody who has sat through this case thus far knows that there are lots of reasons why brokers may have ceased to function. The fact that a broker ceases to function really doesn't mean anything without showing the reason by competent evidence. Surely you are aware of that.

MR. PERSON: Yes, of course I am. I'm trying to explain the cancellations that we have on the list which are attributable to deals that were put --

THE COURT: Cancellations of what?

MR. PERSON: Automobiles that are on the list; that is on Exhibit 699.

THE COURT: You said you were going to go through every broker. You can't mean that literally.

MR. PERSON: Of those that he's aware of and can testify to problems between the brokers.

THE COURT: What kind of problems? What I'm getting at, are you going to base your examination of Mr. Maiorana on some kind of knowledge of the automobile transactions or are you just going to go flying free with him? It makes a difference. I think you are responsible for knowing what happened in the way of automobile orders.

MR. PERSON: What I have been able to extract from the records as to specific transactions that were cancelled.

THE COURT: How many brokers are referred to in 699? How many?

MR. PERSON: 26.

THE COURT: 26?

MR. PERSON: Yes.

THE COURT: That's not every broker. Are you going to limit yourself to 26?

MR. PERSON: No. I would be able to

have him testify to other brokers aswell, brokers that sued Nabcor, brokers that had other complaints about Nabcor, and I am attributing that to the damages caused to Nabcor, the interference with Nabcor as a business, which sets off a chain reaction where it's unable to deal with its franchisees as it had contemplated and the result is that the franchisees, such as Al Young, lost the support services that they normally --

THE COURT: I already heard that testimony.

MR. PERSON: I know that. That's an example.

THE COURT: That doesn't even present a jury question. That was so vague. What's a jury going to do with that? He gets sued and settles out of court. He didn't have to settle out of court.

And the original problem is not attributable to General Motors. You are going to ask a jury, just pure speculation, that General Motors' wrongdoing or anybody else's wrongdoing had anything to do with this fellow settling out of court in a way he claims is unfavorable to him. I would not permit that to get to the jury.

MR. KLEINBARD: Your Honor, mayI make a suggestion? I think it would save time in the long run:

I understand the rest of 699 is going to be presented tomorrow morning. We obviously are in the process of duplicating this at the moment. Isn't the sensible thing to do to see what portion of these sheets that Mr. Person has submitted can be resolved and those which cannot be resolved?

THE COURT: What do you mean resolved?

MR. KLEINBARD: We may be able to supply an explanation or he may be able to give us an explanation where we have a flat agreement as to what happened to a particular car. That at least narrows the issue, and we are both informed as to what cars, what deliveries, we are talking about.

I have yet, of course, to see two things: One, how this witness would be very helpful on this subject; and, two, how you translate it to dollars. I will pass that for a moment.

At least we would not be subjected to this generalized kind of testimony that I know is forthcoming, that is highly prejudicial, and we would narrow ourselves to ten we agree with, twenty we don't, and that's it.

THE COURT: We let this jury go at 3 o'clock yesterday. We have had them sitting in the jury room for two hours and a half, except for sitting in here a little while while we have had side bar conferences.

I will permit you to interrogate Mr. Maiorana as to any competent testimony he can give about Colonial Cadillac.

I will also permit you to interrogate him about any instances which are referred to in your Plaintiffs' Exhibit 699. At least you can try.

I'll start again: If there is any competent testimony he can give about brokers ceasing to function, where he has knowledge and where there is some reasonable tie-in in the evidence thus far or in your Exhibit 699 for identification to refusals to deal, at least you can try to ask him some questions. At least it will show what your questions are.

But this whole thing about why a broker ceases to function requires the most careful preparation and scrupulous knowledge and adherence to the record before it can mean anything, because -- I'm saying this again for the 15th time -- the reason why a broker ceases to function may be due to a whole host of possible causes ranging from his illness to his incompetence to all kinds of things that have not the slightest connection with General Motors. You well know that.

So for Mr. Maiorana to sit on the stand and testify that a whole bunch of brokers ceased to function, it means nothing.

Bring the jury back and at least get into Colonial Cadillac.

THE WITNESS: May I have a break, your Honor?

THE COURT: We'll have to take a short break.

(Recess)

(Jury in box)

THE COURT: You may proceed, Mr. Person.

BY MR. PERSON:

Q Mr. Maiorana, we are going back to the subject of Colonial Cadillac. Can you recall that you entered into an agreement with Mr. Murray at Colonial Cadillac with respect to the purchase of Cadillacs?

A Yes.

THE COURT: Just a minute. This was testified to to some extent the very first part of the trial. I would like to get my transcript in hand, if you give me a minute.

(Pause)

THE COURT: You may proceed.

THE WITNESS: May I correct the record previous to the jury going out? I said something that --

THE COURT: We don't have to cover anything--

THE WITNESS: It was on the two dealers subsequent to the Belcher meetings and I was thinking before, I said Ruckle and I said another dealer, and actually I was thinking of prior to the Belcher period.

THE COURT: I'm going to strike all the evidence about that subject anyway. If we go into that we go into it again. So don't worry.

What is your question?

Q There was a letter agreement that's in evidence right now with Mr. Murray of Colonial Cadillac.

Mr. Maiorana, did there come a time that you had a conversation with Mr. Murray about ordering for 1967 Cadillacs?

A Yes.

Q Do you recall whether Nabcor had purchased an automobile from Colonial Cadillac by the time of this discussion?

A It was at the time of the purchase of that automobile that I went into an oral agreement on the purchase of additional cars, in that time frame. If I recall, it was a tan Calais sedan that Alan Dennison had ordered for one of his customers that was in Connecticut.

Q I'm showing you Exhibit 276. It does not appear to be in evidence. This is a certificate of ownership of title. Look at that and see if that refreshes your memory as to the date of this transaction for the Cadillac that you described.

THE COURT: What exhibit number?

MR. PERSON: 276. It should have been in evidence.

THE COURT: What do your records show?

MR. KAPLAN: We think it's in, your Honor.

THE COURT: You have no objection, right?

MR. KAPLAN: I think we did object at the time it came in and we stand by that.

THE COURT: We'll assume it's in.

MR. PERSON: Can we stipulate it was admitted subject to whatever objection you had?

MR. KAPLAN: We can assume that.

THE COURT: Yes. We can assume that. This record will show what it shows. Don't mark the exhibit further.

MR. PERSON: The exhibit states May 2, 1966 and 5/3/66. There are two dates on this exhibit as to the transfer of title from Colonial to Mercer, and from Mercer to Nabcor.

Q In light of that are you able to recall approximately when you had a discussion with Mr. Murray concerning the ordering of 1967 Cadillacs?

A I believe it was in connection with that order

Q That would be around May 3, 1966, the latter of the two dates on the certificate?

A Yes.

Q Was this a meeting in person or by telephone or in some other way?

A By telephone.

Q Whom did you talk to?

A Bob Merrick.

THE COURT: If you refer to pages 169 and thereabouts this was covered.

Q Subsequently did Nabcor place any order for Colonial Cadillac?

A Yes.

VOIR DIRE EXAMINATION

BY MR. KLEINBARD:

Q You are the president of Nabcor?

A Yes.

Q Is it your testimony that you personally placed these orders in the mail?

A I personally discussed with him on the telephone --

Q That's a simple question: Did you place these orders in the mail yourself?

MR. PERSON: I object to the phrasing of that question. It presupposes the record shows there was anything that was done by mail. I think the record is to the contrary.

THE COURT: Mr. Kleinbard, it may not have been by mail, but be more general.

Q What did you personally do with respect to these orders?

MR. PERSON: I object to that. Why not ask him any of the orders?

THE COURT: I'll overrule that objection. He has testified that Nabcor placed additional orders or he placed additional orders, so the term we are dealing with is the additional orders. After the one of May 1966, right, Mr. Kleinbard?

MR. KLEINBARD: Right.

THE COURT: Let's ask him your questions, Mr. Kleinbard.

Q What did you personally do with respect to orders for additional Cadillacs subsequently ordered after May 2, 1966 Cadillac?

A Called them and gave them the specifications.

Q You called Mr. Murray?

A Yes.

Q Gave him the specifications?

A Yes.

Q For how many Cadillacs?

A I believe we placed about 43 or 44 Cadillacs.

Q I'm talking as to what you did.

A The vast majority of them I placed personally.

Q How many?

MR. PERSON: I would ask to limit the voir dire inasmuch as I think we have established enough for me to proceed with the witness.

THE COURT: I'll allow it to go further.

Q How many of the orders for additional Cadillacs were placed?

A I would have to be general. I would say that the vast majority. That was our only Cadillac source at the time and I was not going to entrust anyone to call in these orders or to disturb the man in anyway or whatever. I was taking care of that particular situation myself to the greatest part.

Q You don't have any record or note that you can particularize for me just how many?

A I could not, Mr. Kleinbard. I would say the majority.

Q The majority of how many?

A I can't give you s apecific number, Mr. Kleinbard. It means the majority. If I had a specific number I would give it to you.

Q You are misunderstanding my question.

You say you placed the majority of the additional orders for Cadillacs. I'm saying how many additional orders for Cadillacs did you place.

A Nabcor placed? I believe there were 43.

Q It's your testimony that you placed the majority of those orders over the telephone with Mr. Murray?

A Yes.

MR. KLEINBARD: No further questions.

MR. PERSON: I would like to either read from the log each of the 44 entries or reach a stipulation with opposing counsel there are approximately 44 entries in the Nabcor log, Exhibit No. 450, which reflects the placing of approximately 44 Cadillac orders, 1967 Cadillac orders, by Nabcor with Colonial Cadillac on the dates that are listed in the log and these dates range --

MR. KLEINBARD: Give us the page.

MR. PERSON: They range from approximately 7/18/66 --

THE COURT: To when?

MR. PERSON: 9/15/66, page 30037, line No. 5.

THE COURT: Are you saying that the log reflects some 40 orders and the dates when they were given to Colonial in each case?

MR. PERSON: Virtually all.

THE COURT: Virtually all. Do you have a list of the orders and the dates?

MR. PERSON: 699 would be a complete list of that.

THE COURT: Do you have a list of what the log shows about the dates of the orders to Colonial?

MR. PERSON: I could read from my exhibit.

THE COURT: Why don't you write it out

over lunch?

The essential thing we are dealing with now, you say that the log reflects some kind of identification number, a Nabcor order number, and then a date when each car was ordered from Colonial.

Why couldn't you take the 43 or so cars and make a list of what is shown? Mr. Kaplan can look at that. Maybe that two-column or so list can be stipulated.

MR. PERSON: The last two entries, if I may be able to refer to these, the next to the last, is consecutive order 234 received by Nabcor December 29, 1966 and ordered on the same date from Colonial Cadillac.

THE COURT: That's the last of this group?

MR. PERSON: Next to the last.

The last entry is an order No. 246 received by Nabcor January 11, 1967 and ordered the same date from Colonial according to the log.

THE COURT: Ladies and gentlemen, I really think we owe you a tremendous apology, but we are at the final stages of the plaintiffs' case. For a great many reasons, which I won't try to go into, there are very legitimate problems that occur frequently about what proof is admissible, what proof is relevant, and so forth.

The lawyers that asked for the conferences have very legitimate problems. We tried at the beginning of the day to talk among each other, and I know we consumed about an hour, thinking we would sort out some of these problems. We called you in and kept you sitting here while we had further conferences at the bench. Then I sent you out and we had further conferences.

All I can say is that the problems are legitimate. I simply do not know any way to anticipate all these things and get them solved so we don't keep you sitting either in the courtroom or the jury room.

One attempt made to anticpate problems was to come in here one Sunday night and go overrMr. Person's claim for damages, but that has not by any means eliminated the problems.

So you will have to be patient. I think we all have to remember, we have a duty to do and it's a hard job. We have to stick to it and be patient and you'll simply have to understand that everybody is trying to bring this case to a close as soon as we possibly can. We are doing out best, even though we may have some frustrations in going forward.

I'll ask you to go out for your lunch and be back at 2:15.

I would appreciate the lawyers in the Nabcor case stepping aside. We have a hearing in another matter.

(Luncheon recess)

AFTERNOON SESSION

2.15 P.M.

(Jury present.)

THE COURT: Have you got a list that you have agreed upon?

MR.KAPLAN: We have a list. The extent of agreement may be less than Mr. Person would like.

There are 43 entries in the log relating to Cadillacs, 42 to 1967 models and one to a 1966 model.

THE COURT: Say that again.

MR. KAPLAN: There are 43 entries in the log relating to Cadillacs in which somewhere in association with the entry the words "Colonial Cadillac" appear.

42 of them are 1967 model cars and one is a 1966 model car.

We will not stipulate that the log reflects that any of them were ordered. Among other things, there are two columns in the log, one of which is headed "Ordered" and one of which is headed "Delivered."

In many of these 43 instances the word "Cancelled" appears not only in the column that says "Delivered" but also over the date which appears in the "Ordered" column.

It is our position or at least it appears to be at this point, that many of those orders even according to Nabcor's order records were cancelled before they ever thought of ordering the car.

THE COURT: What I wonder is if we could do this: all we are seeking now is to convey to the jury what is shown and then there will be questioning of Mr.Maiorana and cross-questioning and argument.

But so that the questioning of Mr. Maiorana can proceed, if you have a list and just as a matter of convenience, if you have some list which shows what you have talked about and can indicate the word "Cancelled" written over or whatever --

MR. KAPLAN: 43 entries.

THE COURT: So is that in some physical form of a list?

MR. KAPLAN: It is, but the physical form is not acceptable to us because it indicates things which we think are misleading.

THE COURT: Let me see the list you have, Mr. Person.

MR. PERSON: I have marked a copy of that 700 for identification.

xx (Plaintiffs' Exhibit 700 marked for identification.)

THE COURT: I don't understand what this is. Why don't you just use the log and --

MR.PERSON: Let me explain what this is.

On the first column I have the page number in the log, 10037. That is the page number of the log where the entry can be found. The next number is the line on the same page.

Following that is the broker number 73 with the first order he ever submitted to Nabcor and after the dash, 73-1, is the first order by Broker 73, which is Riccotelli, which you see in the righthand column.

The consecutive order number is 111 and the date ordered according to the log is 7/18/66, and the indication of "Cancelled" appears with the date 9/15/66.

THE COURT: Let's start and see what Mr. Kaplan -- I guess subject to connection you would have no objection to the chart indicating the page and line number?

MR. KAPLAN: I have no problem up to the date ordered column.

THE COURT: The date ordered is what you say refers to the date ordered from Colonial, right, Mr. Person?

MR. PERSON: That is correct, drawn from the

rp4

log.

THE COURT: Is there a column in the log entitled "Date Ordered"?

MR. PERSON: Just "Ordered," with a date appearing under it.

THE COURT: Now, your problem there with that is what, Mr. Kaplan?

MR. KAPLAN: Two things. First of all, on this first one that you were just looking at, the date in the log doesn't correspond to the date on this exhibit by two months. That is No. 1. But, second --

THE COURT: What is the right date?

MR. KAPLAN: September 15, 1966. That is a matter of some moment because --

THE COURT: Where did you get these dates from, Mr. Person?

MR. PERSON: 7/18 was drawn from the date the order was handed to Nabcor and 9/15 is the correct entry for this.

THE COURT: Are there other similar mistakes?

MR. KAPLAN: I only had it about three minutes to look at, so I haven't got that far.

MR. PERSON: Drawn from the lefthand column on the log, and it should be drawn from the order date.

rp5

THE COURT: Let's take the next one.

MR. PERSON: All the others are correct, your Honor.

MR. KAPLAN: Take the next one, because that is a good example.

On the same page he says the order column says September 15, 1966, from Colonial. Well, the only problem about it is that somebody has written in there 9/15/66, but written over that in red ink in different handwriting is the word "Cancelled."

THE COURT: Couldn't we do something like this, Mr.Kaplan: assume that there is in the log a column under the heading "Ordered" and you have a date and --

MR.KAPLAN: Sometimes it does and sometimes it doesn't.

Your Honor, let me suggest, there is only about four pages of this exhibit that we are concerned with here and there is no reason why we can't pass out Xerox copies of it.

THE COURT: Of the exhibits,the log?

MR. KAPLAN: Right.

THE COURT: Have you got the Xeroxes?

MR.KAPLAN: I don't have them here. I have a couple, but I don't have them at this moment.

You could walk in front of the jury with the log.

THE COURT: You better use the log or Xeroxes of the pages because this apparently is intricate enough that the actual records should be used, so let's use them.

MR. PERSON: I wanted to, I guess, be able to point out to the jury, first of all, the existence of these orders that relate to Colonial Cadillac.

THE COURT: Why don't you do that. I will stand over there and just let's look at it. I would like to see what you are talking about, too.

What have you got, the original log? Are there any Xeroxes here?

MR. KAPLAN: We have a couple.

Our pagination, we have some pages that aren't in this log and so forth,but they are all separately numbered, so long as he identifies what he is talking about.

THE COURT: That is fine.

MR. KAPLAN: You can figure it out.

THE COURT: I think if you would hold it up for the jury and maybe you and Mr.Kaplan can go over there and look on and take a few minutes to go over this and tell the jury what is there, and they will at least get a sample.

MR.PERSON: This is the log --

THE COURT: What page?

MR. PERSON: Page 30037, the first page in the log. 30037, and I will refer to it as page 37 from now on.

THE COURT: Fine.

2

MR.PERSON: At line 5 of the log, each page is numbered from 1 to 36,when we refer to line 5 we are at this point (indicating).

The first column is the date and that means, this represents the date that Nabcor received the order, 7/18/66, and this log is kept through 1970 some time. That next column now is called Order No. That 73 refers to the broker,the Nabcor broker, assigned the same number, 73.

You can tell from over in the column on the far right that the name of the broker corresponding to 73 is Riccotelli. And that is the Nabcor broker with the name Riccotelli.

Sometimes these brokers will have trade names or corporate names as Turco and Nabcor East or Turco Auto Sales --

THE COURT: I don't think we need that.

Riccotelli is the name of the broker.

MR. PERSON: This one after the dash indicates that is is Nabcor's unique number assigned to this order submitted by No. 73. That is the first order that was submitted and the second order obviously would be 73-2 and so on, assuming there was a second order.

The type of car is Cadillac, 1966. That is the year Cadillac, 1966.

This indicates a deposit, $500, in the next column, in line 5.

This is the unique numbering,the consecutive order number for Nabcor orders received by Nabcor which has been kept by and large fairly constantly throughout all of the orders received by Nabcor.

THE COURT: I think we can shorten this. It is the Nabcor order number. What is the next column?

MR. PERSON: There is a column labeled "Order," and in that column we have several types of information. We have the date --

MR.KAPLAN: I object to any characterization. If Mr. Person wants to have it brought out with a witness with knowledge, that is another matter.

MR. PERSON: What the law states --

THE COURT: In other words, the jury is now looking at the log. As far as I'm concerned you are simply helping them see what is there, and then we can have testimony or argument about what it means later.

MR. PERSON: I would like to observe, I would like to have the jury observe,the writing and the kind of writing, that is the type of instrument used with respect to the three entries in a row, 111, 9/15/66, and COL-CAD.

THE COURT: As the jury can see, there is a column which up at the top is labeled order. Then for this transaction there is a date in that column, 9/15/66. I don't see on my Xerox anything else in that column about this transaction.

MR. PERSON: Correct. I was only pointing out to them --

THE COURT: Then the next column --

MR. PERSON: In the column labeled located, COL-CAD. I think we can stipulate that's a reference to Colonial Cadillac.

MR. KAPLAN: Yes.

MR. PERSON: In the next column where it

says delivered --

THE COURT: The next column is headed delivered. What is the entry for this car?

MR. PERSON: Cancelled.

THE COURT: Is cancelled written over anything or is it just the word cancelled?

MR. PERSON: Just the word.

THE COURT: All that's left is the name?

MR. PERSON: That's the reference to the Nabcor broker name, dealer name.

So that is the first place in the log where it says Colonial Cadillac.

THE COURT: Did you want to go through another one?

MR. PERSON: Several more.

The next one is on page 3719. That has 8/2 the date ordered from Nabcor, 75-3.

THE COURT: We can go faster than this. These people are standing up.

Mr. Person, I think they all see that line 19. The date in the first column is 8/2. The dealer is dealer No. 75, and apparently the name is Simpson.

MR. PERSON: Correct.

THE COURT: And then, 1967 Cadillac, Nabcor, order 106.

My Xerox doesn't show very well what is in the ordered column. Can the lawyers agree as to what that says? There is a date, I believe, is there not?

MR. PERSON: It's visible. 9/15/66.

THE COURT: Over that is written or printed the word cancelled; is that right?

MR. KAPLAN: Yes.

THE COURT: And then you have got the reference in the next column to Colonial Cadillac, and then in the column delivered, what does that say?

MR. PERSON: Cancelled.

THE COURT: Let's move on. Are there any others?

MR. PERSON: I'll turn to the last entry.

THE COURT: All right.

I take it there are other similar entries for Cadillacs that again have the date in the ordered column, the word cancelled printed over it, and in the delivered column the word cancelled written.

MR. KAPLAN: Perhaps the record should reflect, since there is only one original here, that for example on line 19 all of the entries are in blue ballpoint ink except that the order number, the date in the ordered column, and the reference to Colonial Cadillac, are in black ballpoint ink, and the word cancelled written over the ordered column is in red ink.

MR. PERSON: There is a variety of ink used..

Now page 37, eight entries.

Page 38 has 13 entries for Colonial Cadillac. Go down the located column and you will see a variety of entries. I represent there are 13 entries for Colonial Cadillac on that page.

At page 39 there should be nine entries for Colonial.

THE COURT: Where do you go from there?

MR. PERSON: Page 40, six entries.

THE COURT: Where do we go from there?

MR. PERSON: Page 41, five entries.

THE COURT: What are the dates under that ordered column for Colonial Cadillac?

MR. PERSON: 11/28/66 for the first one.

I take that back. That's a Chevrolet.

Colonial Cadillac has no order date alongside the date that Nabcor received the order on 12/3.

The next Colonial order also, at 12/21, has no date, order 231.

The ones beneath it begin at 12/29/66, and there are words of cancellation alongside.

Then on page 42, lines 6 and 22, January 11, date ordered --

THE COURT: Page what?

MR. PERSON: 42. Line 6, ordered January 11, '67.

THE COURT: The next one?

MR. PERSON: The last one is Nabcor.

THE COURT: What line?

MR. PERSON: Line 22. It goes back to 11/21, Nabcor. It's at line 22. There is 8/11, Nabcor order No. 1, order No. 196 consecutive, 1967 Cadillac, 11/21/66, Colonial.

THE COURT: All right.

BY MR. PERSON:

Q Mr. Maiorana, you mentioned you placed some of these orders yourself with Colonial Cadillac; is that correct?

A Yes.

Q Do you recall approximately how many of these orders you yourself placed?

MR. KLEINBARD: That was asked, your Honor. I asked him. He was not able to answer that.

THE WITNESS: The majority of them, I say, other than a few.

Q Was each of these orders that you referred to as placed by you placed with any one individual or more than one individual in Colonial Cadillac?

A Bob Murray.

Q You testified that you used the telephone at least for some or all of the orders placed, is that correct?

A Yes.

THE COURT: What does that mean "some or all"?

MR. PERSON: I asked whether he had used the telephone for placing any of the orders and he said yes.

As to all of the orders placed by you had you used the telephone? And he said yes. Each order placed by him --

THE COURT: Maybe we had some mistake.

Are you saying that as to all of the orders you placed you did this over the telephone?

THE WITNESS: Yes.

MR. PERSON: 701 for identification is a group of Deal folders.

THE COURT: That will be marked for identification.

(Plaintiffs' Exhibit 701 was marked for identification)

xxx

THE COURT: Are you offering them or what?

MR. PERSON: I'm offering them but they're looking at them now.

(Pause)

MR. KAPLAN: I wonder if we can't proceed and take this up at a recess. There are an awful lot of documents here. I don't think we can properly object or not object to them without looking at them.

THE COURT: If you want to question about a specific document, use it while you can. Let's have yo question.

Q Are you familiar with your method of ordering theseautomobiles that you have testified you ordered from Colonial Cadillac?

A Yes.

Q Could you describe in what manner the order had been received by Nabcor?

A The broker would send the order to Nabcor, taking it to Nabcor's office if it was close by. Usually you mail it in. That would be on our purchase agreement form.

MR. PERSON: I have marked for identification Exhibits 702 and 703.

THE COURT: Is there a question?

MR. KLEINBARD: On Plaintiffs' Exhibit 704 for identification it is dated before the damage period and there is a handwritten note "See cancellation 10/27," which is also before the damage period. I object to that.

THE COURT: Sustained.

MR. PERSON: I'm trying to be able to use this for the purposes of showing the kind of form that was used in placing the orders.

MR. KLEINBARD: He has the other two.

THE COURT: Get a form that relates to the damage period. There is no reason to have a lot of material presented to this jury that relates to time outside of the period that you complain about.

Ladies and gentlemen, there is a statute of limitations. The plaintiff cannot recover here for any alleged injuries occurring before December 10, 1966. I'm stating that in the most general terms. That's a date you ought to keep in mind.

There is no use having a lot of material go tothe jury about transactions, alleged transactions, befor December 10, unless it's absolutely necessary background.

(Pause)

THE COURT: Can we move along?

MR. KLEINBARD: We are trying to read some handwritten material, your Honor. That's why it's taking so long.

(Pause)

MR. KLEINBARD: No objection to Exhibits 705, 706 and 707.

THE COURT: 705, 706 and 707 are received in evidence.

xxx (Plaintiffs' Exhibits 705, 706 and 707 were received in evidence)

MR. PERSON: 708, 709 and 710 are offered.

MR. KLEINBARD: No objection.

THE COURT: Those are received.

xxx (Plaintiffs' Exhibits 708, 709 and 710 were received in evidence)

THE COURT: What are your questions now?

Q Mr. Maiorana, I'm showing you Exhibit 705 in evidence. Tell me, please, what that is (handing).

A It's a purchase agreement for a 1967 Cadillac, Fleetwood Eldorado by Donna Motor Sales.

THE COURT: Is that a broker of yours or what?

THE WITNESS: That's the purchaser.

THE COURT: This was the purchaser from the broker?

MR. PERSON: The broker's customer and ultimately in the system.--

Q Who would Nabcor sell the car to if this transaction had gone through?

A It would have to be -- I would have to find this out by the number.

THE COURT: Nabcor strictly speaking would sell it to Donna?

THE WITNESS: Yes.

Q Exhibit 706, I'm holding that up, it's an envelope of some sort. Canyou explain what that is?

A This is what we call a Deal folder. It's made up when an order came in and everything pertaining to that folder went into this deal folder for that order.

It lists the car, the customer's name, who our broker is, and whether it was delivered or cancelled or not. There are notations usually made.

(Continued on next page)

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Q It says at the middle near the top 88-1-204. Can you identify what that number means?

A This was a numbering system that we used that identified our broker, his order, and the 204, I am not too sure about.

MR. PERSON: I would like to point out in the log on page 40, at line 19, there is an entry Nabcor received this order on 11/22, Order No. 88-1, for 1967 Cadillac.

A $500 deposit, Order No. 204 ordered 11/23/66, Colonial Cadillac, cancelled, and the dealer, that is, the broker's name is Montclair.

Q On Exhibit 707 in evidence can you find any reference to whether or not a deposit had been made?

THE COURT: By whom to whom?

Q By the customer to Nabcor or the broker to Nabcor.

A Yes, paid $500, 11/22/66, right here (indicating).

Q You are pointing to a box somewhere near the bottom two-thirds and middle of Exhibit 707?

A Yes.

Q This Exhibit 705, which is labeled "Purchase Agreement," and the blue exhibit, 707, labeled 8/15, transfer form, was this a form used by Nabcor in its business?

A Yes.

Q Do you recall when this form was in use?

A In the early part of our business.

Q Is this the form which was used by the broker to transmit an order to Nabcor, 705, the purchase agreement?

A The purchase agreement was ours and this was the order to us, the transfer form.

MR.KLEINBARD: The witness is dropping his voice.

Q Exhibit 707?

A Yes.

THE COURT: Read that last answer back.

(Answer read.)

THE COURT: Is there any document that reflects, that is a copy of an order to a dealer?

THE WITNESS: No.

Q Could you tell me what form you used when you communicated the orders to Bob Murray of Colonial Cadillac?

A I just called them in.

Q Where did you get it from?

A I got it off the purchase agreement.

Q That is Exhibit 705?

A Right.

Q There is a notation on the envelope, the deal folder, Exhibit 706, which says "Cancelled 3/3/67."

Also "Return check No. 1323, IVB, $500."

Do you know what that last reference means?

A Well, this was the return of their deposit of $500, the order cancelled, we couldn't get the car.

And this was a check number on the Industrial Valley Bank in which we returned the deposit.

Q Exhibit 708 is received from Montclair Auto Brokers, $500, on November 22, 1966.

Exhibits 709 and 710 are letters -- Exhibit 709 is a letter to Mr. Ed O'Brien of Nabcor from Montclair Auto Brokers. This is the formal cancellation of order for one Cadillac El Dorado, and please refund the deposit of $500.

Then the other exhibit, 710, is a letter dated February 28, 1967, four days after the day of this prior letter, which was February 24, 1967, from Nabcor in Yonkers to Anthony Maiorana in Jenkintown.

(Exhibit 710 read.)

MR. PERSON: I would like the jury to take a look at these documents underlying this transaction.

THE COURT: What is the date of the letter from Montclair?

MR.PERSON: It is February 24, 1967.

THE COURT: What exhibit number is that?

MR. PERSON: Exhibit 709.

(Exhibits handed to jury.)

BY MR. PERSON:

Q Did there come a time at which you spoke with anyone at Colonial Cadillac concerning the orders that were placed by Nabcor with Colonial Cadillac?

A Yes.

Q Do you recall approximately when?

A Well, it got hot and heavy about the latter part --

MR.KLEINBARD: Can we just have the date, your Honor?

THE COURT: Sustained.

Q Could you state what date, approximately? Just as well as you can do.

A I would say about the week before Christmas of 1966.

Q How can you place it at that date?

A Because we had a blue Cadillac that had been ordered by Arctic Motors of Trenton and he was putting me under extreme pressure, our organization under extreme pressure.

He wanted that car, it should have been in by that time. He ordered it several months before.

I called Bob Murray and he said, "Look" --

MR.KLEINBARD: I object to what Mr. Murray said to him, your Honor. We had Mr. Murray here.

THE COURT: Yes, right. You can certainly bring out certain things,but not what Mr.Murray said.

You could have asked him about Arctic specifically. He was here.

MR.PERSON: It sounds -- I question --

THE COURT: You were asking him how he could place the date. That doesn't call for a lot of hearsay testimony by Mr.Murray.

THE WITNESS: There was -- there was something, your Honor, that places it in my mind at that date. I was about to relate that.

THE COURT: Does it include the conversation by Mr. Murray? If so, you can't testify to it.

MR. PERSON: It includes a statement relating to these automobiles and something else.

MR.KLEINBARD: By whom?

MR.PERSON: By Mr. Murray.

THE COURT: Sustained.

Q You did have a discussion with Mr. Murray?

A Yes.

MR. PERSON: Your Honor, it is --

THE COURT: Let's pass this. You have to ask questions and bring out answers.

MR. PERSON: Mr. Murray has denied there were any orders that he can recall. He claims he may have had an order or so and here is a discussion concerning the orders.

Can I make it a one-sided discussion or we are talking about orders that were placed.

THE COURT: You can ask questions and bring out evidence that doesn't violate the hearsay rules. It is your job, or call in witnesses that have personal knowledge.

Q After you finished your conversation with Mr. Murray, did Nabcor still have orders for Cadillacs on order with Colonial Cadillac?

A Yes. We had all of them on order that we had ordered.

THE COURT: Are you telling me none were

cancelled as of the week before Christmas,1966?

THE WITNESS: There may have been some. Whatever orders that we had that were still on order, your Honor, was still on order and we were still ordering cars.

I was told we were going to get them.

THE COURT: My question was simply, and we had a display to the jury and to me of this order log with lots of entries cancelled.

I just wonder if any of those occurred the week before Christmas in 1966, and you said what, some had?

THE WITNESS: I believe some had.

Q Had you communicated any of these cancellations that occurred prior to this conversation with Mr. Murray to Colonial Cadillac?

A Yes, I had talked to him several times previous to that.

Q Be careful now. You had communicated with him cancellations of orders, to Mr. Murray, prior to your telephone conversation in the middle of December?

A Yes.

Q Did there come a time at which you became aware that you were not going to be able to get any

Cadillacs from Colonial Cadillac?

A Yes. I would say that --

Q Let me just ask you, can you place that date?

A Yes.

Q When did that occur?

A By the end of February I was reasonably positive that I wasn't going to get any Cadillacs. In fact, I was told --

Q Stop. Did you have any communications with Colonial which was a terminal conversation?

A Yes.

Q Did you have any further conversations with Mr. Murray concerning obtaining Cadillacs?

A Yes.

Q Do you recall when they occurred?

A I had one in the Summer, I believe, of 1967.

I had one in 1971, I believe. I had another conversation with him.

I had another one with him in 1972, I believe.

Q Was there any agreement with respect to supplying cars to Nabcor?

MR. KLEINBARD: I object to that, your Honor.

A Yes.

THE COURT: Overruled.

Q In 1967?

A No, 1967 --

THE COURT: Is the answer no, there wasn't?

THE WITNESS: There was an agreement to attempt to get us a fleet certificate and an allotment. That was the agreement. He came to visit me in New York.

THE COURT: In 1967?

THE WITNESS: Yes.

MR.KLEINBARD: I move to strike, your Honor.

THE COURT: The fact of an agreement, if it is a fact, is a -- I will overrule that objection.

You are saying that in 1967 there was an agreement between you and him to try to get you a fleet certificate and fleet allotment? Is that what you just told me?

THE WITNESS: Yes.

THE COURT: All right.

THE WITNESS: He said I need a fleet certificate --

THE COURT: I asked yes or no.

Q Did you have any subsequent conversations with him concerning -- just answer yes or no -- concerning that agreement?

A Yes.

Q As a result of that conversation did you learn that you were unable to buy any cars from Colonial?

A Yes.

MR. PERSON: Exhibit 545 for identification.

MR.KLEINBARD: I object to that, your Honor. Outside the time period and hearsay.

THE COURT: Let me see it.

(Handed to Court.)

THE COURT: I think you better try to lay a foundation for that. Ask the witness what that is.

Q Mr. Maiorana, you testified that some time in 1971 you had an additional discussion with Mr. Murray concerning automobiles.

I would like to show you Exhibit 545 for identification. Could you read it, please.

THE COURT: To yourself.

Q Yes, to yourself.

A Yes, Mr.Person.

Q Have you had a chance to read it?

A Yes.

Q Does this Exhibit 545 reflect --

THE COURT: Mr. Person, before you get to that, what it reflects, is it a letter he sent and was it returned or any copy of it returned with the signature? There are a few elementary points.

Q Did you have a conversation --

THE COURT: No, did you hear me?

MR.PERSON: Yes, I did, your Honor.

THE COURT: Did you send that letter to Mr. Murray?

THE WITNESS: Yes,sir.

THE COURT: That document has a space -- let me see that, please.

This indicates he sent it and it asks for a confirmation and signature or signature and confirmation. It has a space for Mr. Murray to sign on behalf of Colonial Cadillac.

Did he return it to you signed?

THE WITNESS: No.

BY MR. PERSON:

Q Can you state what it is that you had discussed with Mr. Murray?

MR. KLEINBARD: I object to that, your Honor.

THE COURT: Sustained.

I think testimony about something that could reasonably be called an agreement, if somebody testifies there is an agreement that's testimony of a fact subject to credibility problems and not a hearsay thing; when a letter is sent requesting the other side to the proposed agreement to send it back and confirm the agreement in writing, and that is not done, at least the proposed written agreement is not made.

MR. PERSON: Then we have to see if there was an oral agreement which they had reached. That's what I am asking him.

THE COURT: Ask him if there was an oral agreement.

Q Had you reached an oral agreement with Mr. Murray?

A Yes.

Q State what it is that you agreed to?

MR. KLEINBARD: At what time?

Q What date approximately?

A Approximately this date, maybe a couple of days before.

Q What date is that?

A April 12, 1971.

Q What was the agreement?

MR. KLEINBARD: I object to that.

THE COURT: Overruled.

A The agreement was that he would try to get us a fleet certificate and an allotment of cars and we would pay for those cars $450 over invoice for all cars that would goto that fleet certificate or that fleet allotment. Any cars that we would get out of his stock, his retail stock, we would have to pay $550 over invoice. In other words, we paid a penalty of $100.

THE COURT: You would pay 450 out of what?

THE WITNESS: Out of our fleet allotment. He was going to buy out of a fleet certificate for us. And if he had to give us one out of his retail stock it would be 550.

There is more to the oral agreement.

THE COURT: Next question?

Q What else was there to this agreement?

A The agreement hinged on the fleet certificate, if we got an allotment. He would not give us one out of his stock if he could not replace it out of our allotment. If we needed a car right away he would give it to us out of that stock and order that automobile.

Q At what price on that gransaction?

A $550 and then order that automobile out of our allotment to replace it for his own stock.

Q Did you have any subsequent communication with him concerning this agreement?

A Yes.

Q What was said? When did this occur?

A Three or four days later. What did he say to you?

THE COURT: Later than what? Later than the letter or the talk or what?

THE WITNESS: Later than the letter. In other words, I was looking for his confirmation letter back and he told me he had talked to the zone again and --

MR. KLEINBARD: There is no question pending, your Honor.

THE COURT: Obviously we have the familiar problem.

What are you asking?

I'll strike any answer that was given while Mr. Kleinbard was standing, and I'll strike the last answer because I think that's what it includes.

What is your question?

MR. PERSON: To state what it is that was said subsequent to this letter in connection with the agreement.

MR. KLEINBARD: I object to that.

THE COURT: Sustained.

Q Were you able to purchase any cars from Colonial Cadillac after the date of this letter in connection with that agreement you testified to?

A No.

Q Did Mr. Murray tell you why?

MR. KLEINBARD: I object to that.

A Yes.

Q Could you state why, but wait for the objection?

MR. KLEINBARD: I object to that.

THE COURT: Sustained.

Q Exhibit 655 in evidence states --

THE COURT: Was this letter shown to Mr. Murray when he was here, this Exhibit 545 for identification?

MR. PERSON: I don't believe so.

Q Exhibit 655 in evidence is a Nabcor new car order form.

THE COURT: From whom to whom?

MR. PERSON: I was not going to bring out evidence on that. It is from Colonial Cadillac to Nabcor.

THE COURT: Is this in evidence?

MR. PERSON: Yes.

THE COURT: What is your question?

Q Do you know when that form was used?

A This was a form that I believe we had just started using at that time.

Q What date are you referring to?

A This is the end of November, 1966.

Q Was that a temporary type of order form?

A Yes.

MR. PERSON: I hand Exhibit 655 to the jury (handing).

THE COURT: Does it refer to an item in the log?

MR. PERSON: Item 203, your Honor, which is at the log page 40, line 25.

THE COURT: I don't see 203. I'm sorry.

MR. PERSON: Page 40, line 25. That three might come out a little faintly.

THE COURT: It probably does.

MR. PERSON: I show this to the jury.

THE COURT: 11/23/66?

MR. KLEINBARD: 22, is it not?

MR. PERSON: 11/22.

THE COURT: I am in the column in the middle of the page.

MR. PERSON: Line 25.

MR. KLEINBARD: 11/23 would be it, your Honor.

THE COURT: I think I see it.

(Pause)

MR. PERSON: Exhibit 654 in evidence, another Colonial Cadillac order, dated 11/23/66, order No. 204. I show that to the jury (handing).

(Pause)

THE COURT: It's the same type of thing?

MR. PERSON: Yes, your Honor.

THE COURT: Can we go ahead with questions, please?

BY MR. PERSON:

Q Did you have any further agreement with Mr. Murray with respect to whether he would supply Cadillacs to Nabcor?

A Yes.

Q When did that occur?

A I believe it was in '72 sometime.

Q You bought a car from him?

MR. KLEINBARD: I object to that on the ground of it being outside of the time.

THE COURT: Stick within our time limits, please, and a few other limits.

Do you have any other questions that relate to the time period we are involved with?

MR. PERSON: No more outside the time limit.

I'm going back now to specific transactions that we have indicated there were problems with.

THE COURT: Anything more about Colonial Cadillac?

MR. PERSON: Yes.

Q Mr. Maiorana, what was the gross profit which Nabcor was to have made on these Colonial Cadillac transactions?

A $50.

Q Is that per car?

A Yes. Our deal was uniform, Mr. Person, on any automobile. We just took $50.

Q How much was a broker to have made?

A We had a $200 brokerage fee. However, we could not hold to that and they could have made more than that if they saw fit to charge more. But the broker wouldhave made $150 at that time period we are talking about in 1966. Later he would have made $150 and $50 would have went to an area broker.

THE COURT: You are saying if he had charged the $200 fee back in 1966, $50 would have gone to Nabcor and $150 to him?

THE WITNESS: Yes. However, there were other things like finance, insurance, used cars at wholesale, that we could have made additional profit on, especially on Cadillacs which were highly desirable cars in the used car business.

MR. KLEINBARD: I don't think there is any evidence of this at all, that Nabcor ever did any financing of car sales.

Q Did Nabcor intend to obtain financing for automobiles?

A Yes.

Q One of these transactions for the Colonial Cadillac was an order submitted by Nabcor broker Northeast Auto Brokers and broker code No. 64-2?

THE COURT: What is your question?

A Mr. Person, if you can give me the name of the individual I can identify the broker better that way rather than the corporate name.

THE COURT: Frank Jones.

THE WITNESS: All right.

MR. PERSON: Frank Jones, Northeast Auto Brokers. I'm just trying to set a date on which he signed his franchise agreement drawn from Exhibit 692 in evidence.

April 18, 1966, that's the date of his franchise agreement with Nabcor.

Q Was the termination of Nabcor's auto brokerage business in March or April of 1973?

A April of 1973. April 19.

Q You went out of the automobile brokerage business at that time?

A Yes.

Q Was Northeast Auto Brokers a broker at that time?

A No.

Q Did Northeast Auto Brokers cease submitting orders to Nabcor at sometime prior to that?

A Yes. I believe it was in early 1967.

THE COURT: The log would reflect that, would it not?

MR. PERSON: It would and I'm looking for it now.

THE COURT: Is there any order submitted to Nabcor within the period we are talking about?

MR. KAPLAN: No, your Honor.

MR. PERSON: On 12/5, page 40, line 23, this is the last entry for this particular broker, and it was ordered on 12/7/66. That is not a GM product but that was the last order for this particular broker.

He had had activity according to the prior log entry on January 27, 1967.

THE COURT: He what?

MR. PERSON: He had activity with Nabcor on January 27, 1967.

MR. KLEINBARD: Where does that appear?

MR. PERSON: Page 26, line 40.

THE COURT: He ordered a car, a Pontiac, on November 23 and it was delivered January 27, obtained from Ruckle Pontiac. What question do you have of this witness about Northeast?

Q Did you have any communications with him concerning ordering cars from Nabcor?

A Yes.

Q Would you state when you spoke with him?

A In the early part of 1967. In our efforts to --

MR. KLEINBARD: I object to the conversation because so far there is no indication that there is any General Motors car he failed to get within the time period. That's also hearsay.

THE COURT: There is an objection.

MR. PERSON: He terminated the period within the four-year period. He received that Pontiac from Ruckle January 27, 1967, and subsequent to that time he ceased as a Nabcor franchisee. I am trying to find out any reasons for that.

MR. KLEINBARD: That's not the appropriate way to handle that.

THE COURT: Have you interviewed him, taken his deposition?

MR. PERSON: I may have interviewed him. I have interviewed a few of these --

THE COURT: I'll sustain the objection.

Q Do you know of any services that Nabcor was not able to perform for the Northeast Auto Brokers?

THE COURT: I object to this. It's irrelevant at this point.

A Yes.

MR. PERSON: I don't see how that's irrelevant.

THE COURT: I'll overrule the objection.

Kan I have the lawyers come up.

(At the bench)

THE COURT: I don't know the whole story on Frank Jones, but the main thing that is shown by admissib le evieence is the record of orders received and orders either filled or not filled. Here we have a situation where apparently -- how many orders did he send in regardless of when?

MR. PERSON: Approximately five. It's on that sheet which I've given to you. I indicated the last order number.

THE COURT: Let's say five orders. How many did he fail to get?

MR. PERSON: I see at least two on the

list. I would have to go back and get my list, the one that we have complained about here and the other was a Chrysler.

THE COURT: The one that was complained about, was that a Colonial Cadillac?

MR. PERSON: Yes.

THE COURT: I thought I had that down. When was that ordered? When is it ordered by him? What number is it?

MR. PERSON: I'll have to go back and get my papers.

MR. KAPLAN: August 31, your Honor.

THE COURT: What is the number?

MR. KAPLAN: 80.

THE COURT: That's the very first thing.

MR. PERSON: 9/15/66. That's the date. There is no indication otherthan by the inability to obtain the car.

THE COURT: Isn't there a cancelled written on the thing? Where in the log is it? What page?

MR. KAPLAN: Page 37, line 27.

THE COURT: That's car 80. I'm assuming that the farest column refers to the date that Nabcor received the order from him. That's

August 31. Then in the column ordered, which I will assume forthe moment refers to some order, at least you would claim that it relates to the date of order to Colonial, that's got some --

MR. PERSON: It says cancelled beneath that.

THE COURT: That's the date underneath that?

MR. PERSON: It says cancelled, your Honor.

THE COURT: What is the date of the cancellation?

MR. KAPLAN: Doesn't say.

MR. PERSON: In this case, your Honor, there is no indication other than by the inability to get the car.

THE COURT: In any event, Mr. Person, I don't know what the story is on the statute of limitations period. This is very marginal. It seems to me you have the burden of proving an offense occurring within the statute of limitations period for which you can recover damages. You have not got anything about the time that this was cancelled.

MR. PERSON: The customer didn't cancel

it as far as we know.

THE COURT: When was that the cancellation was given to whoever it was --

MR. PERSON: In January.

THE COURT: Where do you get that date?

MR. PERSON: The witness' testimony.

THE COURT: How does he know?

MR. PERSON: He had spoken with Mr. Murray.

THE COURT: He did not say that this was cancelled in early '67.

MR. PERSON: He learned they could not get the car in early '67.

THE COURT: I don't think he said that.

MR. PERSON: I tried to elicit this.

MR. KAPLAN: Plaintiffs have 453 for identification, which purports to be a list of orders with suppliers as of January 6 and there is a list of some 30 cars at Colonial not including the one we are discussing. So whatever happened, happened by January 6, according to their own records.

THE COURT: I'm saying you are starting out with a very marginal situation at best. You've got a lot of hearsay problems raised. Why don't you get to some situation where there are problems that clearly arise within the damage period. At least you can show to the jury orders that were denied and then you have a problem that we can get our hands on instead of having this thing that is a series of transactions, most of which apparently took place outside the damage period, maybe something occurred within the damage period. What? We really don't know. This is not the place.

I don't see a lot of utility in trying to explore the exact status of Mr. Jones' business when most of the business and most of the events took place outside the damage period. I don't mean you can't argue about it, but let's get to something where we can get our fingers or hands on it a little better than this.

Talk about Augustine or somebody.

MR. PERSON: I would like to be able to at least get on the record that this broker terminated as of the date of his last order --

THE COURT: Terminated in what form?

MR. PERSON: As a Nabcor franchisee.

THE COURT: Did he send a letter?

MR. PERSON: No.

THE COURT: What did he do to terminate?

MR. PERSON: Not submitting any more orders.

THE COURT: I think you can get on the record that you never received any more orders from him after a certain date. Certainly you can do that.

Let's do that. You can get something on the record. Let's move on.

(In open court)

T5

MR.PERSON: The log reflects for this broker, Frank Jones, that no more orders were received by Nabcor after December 9, 1966, and the last order that he had received was a Pontiac on January 27, 1967.

THE COURT: Let's pass from Jones. What other situation do you want to take up?

MR. PERSON: Augustine Motors Car Brokerage Company, owned by George Tedesco, and he had signed his agreement in September, 1966, drawing it from Exhibit 692 in evidence. He was located in New Rochelle, New York.

We have a series of car orders about which we complain and these numbers which are consecutive order numbers of Nabcor are 149, 216,217, 218,220, 221, 232, 233, 234, 246 and 315.

MR.KLEINBARD: Excuse me, your Honor. I object to any prior to 232 unless I get the date. 232 is just after the period.. I suspect the others are prior to the period.

THE COURT: The placement of the order, is that right? The dates of these orders by Augustine to Nabcor is what you are referring to?

MR. KLEINBARD: Even to the receipt of the order by Nabcor. He just went too fast. If I were given the dates it would be much easier.

THE COURT: I think we can take your questions. The problem is that some of the orders may be received prior to the damage period, but we don't know what happened during the damage period, and let's try to go ahead with the questions.

MR.PERSON: 148 is Colonial --

THE COURT: Don't try to describe it. Can you ask questions of the witness?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. PERSON:

Q Are you familiar with the Augustine Motor Brokerage Company?

A Yes.

Q A Nabcor franchisee?

A Yes.

Q Do you know Mr. Tedesco?

A Yes.

Q Did you have any conversation with Mr. Tedesco or anyone else at Augustine Motors concerning any inability to obtain cars or any delays?

A Yes, with Mr. Tedesco.

MR. KLEINBARD: I object, leading.

A (Continuing) And his sister.

MR.PERSON: I am trying to limit it. I don't know what else to do. If you want to have all the conversations,Mr. Kleinbard, you would object further.

MR.KLEINBARD: That is right.

MR. PERSON: Would you like that?

MR. KLEINBARD: Go ahead.

MR. PERSON: I am trying to limit the conversation and if I ask leading questions it is to limit it. The purpose is to exclude other things Mr. Kleinbard would really object to, so I am just trying to --

THE COURT: Ladies and gentlemen, I have to adjourn a little early today for a meeting, and I will let you go now and we will start promptly at 10 tomorrow.

I am sorry for the frustrations of the day. I want to talk to the lawyers a minute.

(Jury left the courtroom.)

MR. PERSON: Your Honor --

THE COURT: Look, Mr. Person, I do not like to continually conduct instructions on how to present a case, but I have to do it at every juncture.

I sat through many cases, including criminal cases where there are very fine lines to be drawn and difficult paths created by the rules of evidence, which, believe me, are very, very strict. They are strictly adhered to by the United States Attorneys and I don't sit up and instruct the United States Attorney on what to put in.

They know they have to go by the rules of evidence and they do it.

MR.PERSON: I am trying to.

THE COURT: Once in a while something happens, some question and some argument,but there isn't a continual problem.

We must have spent hours today, literally hours on evidence problems,compared with the amount of evidence that was put in.

Now, if you want to show that Augustine went out of business and thereafter failed to provide Nabcor with business which might otherwise have been provided or you want to show something like that, there are ways to do it.

If you want to show that Augustine was forced out of business because of his inability to get these Cadillacs and the one Pontiac in question here,there are ways to do it.

But that depends on a description of Augustine's business by people who are competent to testify, people who were there, people who saw things.

Under no stretch of the imagination, under no theory, whether it is conspiracy hearsay or not, under no stretch of the imagination, can this witness testify as to the facts about the Augustine situation by saying what Augustine told him. You cannot do it and there are ways to do it.

MR.PERSON: I am trying to follow your own rulings and trying to draw from the instructions that you have given today,which has been quite substantial, and I appreciate it.

What I am trying to do is show that the hearsay in question is leading up to either action or inaction as the means of being able to show what Nabcor did not do for the broker.

THE COURT: That isn't the point here, Mr. Person.

You want to show that Augustine went out of business because he couldn't get the Cadillacs he wanted to, right?

Therefore, Nabcor couldn't get the quantity of business which it should have enjoyed. Well, you are entitled to prove that or try to prove it.

But I am telling you right now that you better figure out how and you better stay up tonight and figure out and you can't do it by hearsay. You have got to get competent proof.

I can sit here and think up lots of types of competent proof, but it is not my job to do so, and that is all there is to it.

The time is going to come when I am going to cut this case off. It is entirely inappropriate for the Judge to have to spend this vast amount of time and energy talking to the plaintiffs' lawyer about evidence problems and I don't knowwhether this would be deemed proper in higher courts or not.

But the time will come when I will cut off the proof simply because I cannot tolerate the type of presentation and the vast waste of time in the courtroom.

If you come to the point where you are not able to put on the proof, I will cut it off, and if the time comes when nothing can be done without me instructing you on how to put on your case,again I will cut it off. I won't go through it. I have to end this case and I have got to carry on the business of my court in some reasonable fashion. This is not it.

Maybe somebody revieweing this record objective will say this is all my fault - maybe it is. But I don't think it is and I think that I have to proceed, solve this problem and this trial is a grievous problem.

MR. PERSON: You are not saying that we can in 150 brokers, I trust.

THE COURT: I am simply suggesting that you have to figure out a way to present a case in a reasonable period of time through competent evidence and proper organization, proper investigation, proper discovery which would have shown you how.

And I can sit here and tell you some ways how to do it, but it is not my province. I spent enough time telling you, but you don't have 150 brokers that any sensible person would put on. There would be, it seems to me, a few situations which are revealed by the documents which are worth exploring or were worth exploring during the six years this case has been pending, and that you would now know situations which could be presented to this Court by competent evidence, of people who are reasonably competent in their business, reasonably active, making reasonable attempts to make a go of it and had reasonable prospects except for their failure to get cars.

As to some of the brokers there is evidence.

We can start with the plaintiffs. We had Mr. Young on the stand, presumably you have a deposition of Mr. Jamele. Mr.Turco, you had Mr. Strimple and you had Mr. Bolling. So the matter is not without illustration. The trouble is most of it does not favor your case.

But I am not going to have a lot of proof put on by hearsay simply because the people who appeared here as witnesses have not supported your case.

We have tomorrow and I expect the material to be produced tome that I asked and that 10 o'clock deadline is an absolute deadline.

As far as the testimony of further witnesses, I intend to sit here, I will issue no more instructions or admonitions. I will simply rule on the objections and we will simply go through.

If you put on competent proof, fine. If you can't, that is that.

But I am not going to continue the present course of the trial. I think tomorrow put on proof about damages or if you don't have the evidence, you fail.

MR. KLEINBARD: May I inquire about tomorrow? Is anybody except Mr. Maiorana going to testify tomorrow?

THE COURT: I haven't the faintest idea.

MR. KLEINBARD: May I ask Mr. Person?

THE WITNESS: Can I say something?

THE COURT: No.

Who else?

MR. KLEINBARD: Mr. Maiorana.

THE COURT: That is it? Do you have any other witnesses?

MR.PERSON: I have transcripts of depositions still to put in evidence and the accountant from Nabcor.

THE COURT: Will that complete your case, right?

MR. PERSON: Let me just take a look and see.

I wanted to call the United Auto Brokers of Detroit and Automotive Purchasing to show what other brokerage firms had done in terms of their ability to compete without the same influences, to be able to let them have a model which can be a guide for damages in this case.

THE COURT: It seems to me that we would have a host of difficult questions as to comparability.

Do we have the same amount of energy put in? Do we have the business managed the same? Do we have the same time periods? Do we have the same methods? Is any of that even reasonably comparable?

I am not prepared to rule on that tonight, but are you going to put on such witnesses tomorrow?

MR.PERSON: Not tomorrow.

THE COURT: We can talk about it tomorrow, and I will certainly need to have evidence about this other -- information about this other company which would permit me to rule on whether the situations are comparable. So we can discuss that tomorrow.

But we have to move fast tomorrow and we will just have to avoid all of this colloquy and start promptly at 10 before the jury and move right through.

MR. PERSON: And the accountants, Irving Purcell and Gitler & Gitler.

(Adjourned to November 24, 1976, at 10.00 A.M.)

NATIONAL AUTO BROKERS CORP., et al.

vs. 70 Civ. 5 421A

GENERAL MOTORS CORPORATION, et al.

November 24, 1976
10:00 a.m.

Trial resumed.

- - -

(In open court; jury present)

THE COURT: Let's have a bench conference.

(At the bench)

MR. PERSON: I have here, and I'm handing up to you, a copy of 260 pieces of paper which represent car transactions that we claim were delayed in delivery from the norm. We set a period of 40 days or more than the time that the car was ordered to the time the car --

THE COURT: Ordered by whom from whom? From a dealer?

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MR. PERSON: Yes, your Honor.

THE COURT: Mark that for identification and we'll discuss it further.

MR. KAPLAN: For the record, we move to strike all of it. Mr. Person flatly represented that everything that there was going to be complained of in this case was submitted by yesterday morning and totalled about 95 or 100. I'll give you the page reference.

MR. PERSON: That's not true.

THE COURT: I'll not argue it now. You can have it marked for identification and we'll deal with it.

MR. KAPLAN: May I give you the page reference? We can do it later also.

THE COURT: Please.

(In open court)

(Plaintiffs' Exhibit 711 was marked for identification)

xx

FRANK MAIORANA resumed.

DIRECT EXAMINATION CONTINUED

BY MR. PERSON:

Q Mr. Maiorana, do you remember who Nabcor was dealing with back in early 1966 to acquire Chevrolets?

A I believe we dealt with Degnan in Philadelphia and Luby in New York. We got one car from Degnan.

Q You were dealing with Luby Chevrolet in what part of the year? This was in 1966 I presume.

A I believe we started in the spring-summer of 1966 with Luby.

Q Did you meet a Mr. Bud Morrison during this period?

A Not during this period. Later.

Q When did you meet him?

A I met him, I guess it might have been, in October or November of 1966 at the Ruckle new car showroom, the 1967 showing of the new Pontiacs.

Q Who was he affiliated with at that time?

MR. KLEINBARD: We have been all through this, your Honor. I object.

MR. PERSON: For the record, I guess I can assume Mr. Morrison was with Don Allen Chevrolet at thetime.

Q Did you give some orders to Don Allen Chevrolet during 1966, the latter part of the year?

A Yes.

Q How many suppliers for Chevrolets did you have at that time in the New York area?

A I just had two: Don Allen Chevrolet and Luby Chevrolet.

Q You testified to what happened in terms of the transaction with Don Allen Chevrolet. I believe you testified concerning Luby Chevrolet. I am not sure at this time.

THE COURT: It's your job to be sure.

A I don't recall that I did testify to that, Mr. Person.

Q Did there come a time at which you were no longer able to buy Chevrolets from both Don Allen and Luby, or Midtown Chevrolet and Luby?

A That's right. We were shut off from both dealerships.

MR. KLEINBARD: I object to that. I move to strike the last statement.

THE COURT: I think the testimony is already in the record.

MR. KLEINBARD: 257 and 258, your Honor. I'm not sure.

MR. PERSON: I think the record is replete with evidence that --

THE COURT: Just a moment.

What is your page?

MR. KLEINBARD: 257 and 258, I believe, your Honor.

THE COURT: I don't think that's it.

MR. KAPLAN: That's with respect to Luby, your Honor.

MR. KLEINBARD: It's immediately followed by a reference to Midtown and Don Allen.

THE COURT: What day? Are you talking about the trial or the preliminary hearing?

MR. KLEINBARD: Trial, your Honor. I believe it's October 21.

THE COURT: All right. Give me the page again.

MR. KLEINBARD: 257 and 258, and then continuing on.

THE COURT: I must assume that on this subject you presented all the evidence about liability that you wished to present within the rules of evidence.

MR. PERSON: Correct.

THE COURT: If you wish to present evidence about damages in some competent way, you can do it.

The last answer is stricken. It gets

into the kind of thing we were dealing with before, the evidence questions. If you wish to borrow the transcript and build upon it, you can do it right now. I'll give it to you.

Q During early 1967, did you have any suppliers in the New York area for Oldsmobiles?

A Rosenstock Automobile.

Q Did that source of supply terminate in 1967?

A Yes.

Q What month, approximately?

A I would say it was in the spring, March, April.

Q Did your sources of supply for Cheveolets terminate --

MR. KLEINBARD: I object to the leading, your Honor.

Q At what time did your sources of supply for Chevrolet terminate?

MR. KLEINBARD: I object.

THE COURT: Overruled.

A In March of '67 for Luby and in December of '66, the latter part of December, and the early part of January of '67 for Don Allen Chevrolet, Midtown Chevrolet.

Q Did you have any difficulty during the same time period with Pontiac?

MR. KLEINBARD: I object to the form.

THE COURT: Sustained.

Q Did you lose your source of supply of Pontiacs during that period?

A Yes.

Q You testified yesterday to the Cadillacs?

A Yes, Colonial Cadillac.

Q How many car divisions were there of General Motors?

A Five.

Q We have counted four so far. Buick, I guess, is the remaining car division.

Did you have a source of supply for Buicks in the New York area?

A Yes. We had Sharkey Buick, then taken over by Cunningham Buick, which was a Motors Holding-owned dealership, to my understanding, and they refused to deal with us and we lost that source of supply.

Q Do you know when that was?

A In the Spring of 1967.

THE COURT: May I have the last answer read?

(Record read.)

MR. KLEINBARD: I move to strike "They refused to deal with us, your Honor." It necessarily involves hearsay.

MR. PERSON: I have no objection.

THE COURT: I assume what is meant here, and you should remember this, you have a right to testify you ceased buying cars or were unable to buy cars or something without getting into what they said to you.

MR. PERSON: Right, your Honor.

THE COURT: That is all Mr. Person is trying to do and the jury understands this, so just try to remember that, Mr. Maiorana.

THE WITNESS: Okay.

Q Was Nabcor in this period of time in the business of selling other makes and models of automobiles?

A Yes, Ford, Chrysler, Mercury, Lincoln, American Motors products and all the Chrysler line.

Q Did you experience any similar difficulties with any of these other automobiles?

A Yes.

Q Could you just name the make of automobile or makes of automobiles?

A Ford,primarily. I don't believe we had too many problems with Chrysler and American Motors in the New York area, that source of supply.

Q Did these events that you have just testified to have any consequence to Nabcor? Did it have any effect upon Nabcor's business?

A Yes.

MR. KLEINBARD: I object to that as a conclusion, your Honor.

THE COURT: I will overrule it. It is a very general question and whether Mr. Maiorana is going to say or give testimony that is admissible, I haven't the faintest idea at this point. But, anyway, I assume that you know what is coming.

Q Could you describe the effects that this had on your business?

A Yes. It created chaos in our business.

MR.KLEINBARD: Your Honor, I object. We are getting the same kind of generalities we had once before.

MR. PERSON: I think he is competent to testify as to what happened to his business.

MR. KLEINBARD: It is contradicted by the record.

MR. PERSON: You will have a chance.

THE COURT: I can't deal with this kind of generality.

Q Could you be specific, Mr. Maiorana?

THE COURT: I think that we have to have some reasonable step-by-step statement about causation. I don't think that is asking too much at this point and in view of the record in this case, because chaos can come from a lot of reasons and his reason that the chaos came from one thing is just his opinion.

Let's have some specific things that are said to have resulted from the things in evidence in this case.

Q Mr. Maiorana, about how many employees did you have during 1966 at a maximum. Try to distinguish between franchise salesmen and others.

MR.KLEINBARD: I object to that, too, your Honor.

THE COURT: I will allow it.

A About 60 employees, I guess, 50 or 60 employees.

Q When was this, approximately, that you had that many employees?

A At the end of 1966.

Q You testified earlier that this number changed, and could you state at what approximate date there was a change in number?

A In the latter part of December when we lost our source of supply we lost employees and we lost franchisees. It created all sorts of this type of problem.

We were having weekly training sessions at that time. Our training program was a 16-week program where each week all of the brokers in the New York area would come to the Westchester Town House in a large room and have training sessions.

THE COURT: If I recall, the question was somewhat limited. Read the question.

(Question read.)

THE COURT: The question was when there was a change in the number of employees.

MR. KLEINBARD: That was asked and answered.

THE COURT: It relates to the claim of damages. But try to restrict your answer to the questions, Mr. Maiorana.

THE WITNESS: I am sorry, your Honor.

A The latter part of 1966, early part of 1967.

Q Was the financial condition of Nabcor affected by these terminations of dealers which you described?

A Yes.

MR. KLEINBARD: It is a very broad question, your Honor.

THE COURT: It certainly is.

Q Could you state in what way?

A Well, we lost quite a few of our franchise men, Joe Quinn, when he saw that we couldn't have our own source of supply, he went off into his own business and --

MR. KLEINBARD: He doesn't have to give what he thought and just names and numbers.

Q Could you name the franchisees that you had prior to this time, some of the ones, not all, but the more active ones?

A That we lost?

Q No, just name the active franchisees that you had.

MR. KLEINBARD: At what time?

Q Prior to the events that you have testified to, the terminations.

A Joe Bente, Rissoto Motors, Rissoto, Soloff, Tedesco, Midland Management, New York Auto Brokers, Arctic Motors -- Ippolito, which was active. About 20 of them.

Goldfeder was another one which was very active at that time, Rigotelli.

THE COURT: Are there others?

THE WITNESS: Yes, as I try to remember. About 20 or so. I can't remember all.

THE COURT: Can the reporter read the names back so I can make a list?

(Record read.)

THE WITNESS: Al Skinner.

THE COURT: Are you adding Skinner?

THE WITNESS: Adding Skinner.

THE COURT: Any others?

THE WITNESS: There are more, your Honor. I can't remember them at this moment -- Alf-Lex Motor Brokers. ChuckCohen, Vandermar, Newburgh, New York. Turco was one of our brokers at that time.

Q Prior to these events --

A I can't think of any more at this point. Go ahead, Mr. Person.

Q Prior to these events, these terminations as I refer to them, were each of these brokers, Nabcor brokers, franchisees of Nabcor prior to this time?

A Yes.

3 . pgr1 F.Maiorana-direct

Q Could you state what effort and expense Nabcor exerted or expended in order to obtain these brokers? Can you describe the efforts and the costs of obtaining these brokers?

MR. KLEINBARD: May I have a voir dire on that?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. KLEINBARD:

Q Mr. Maiorana, did you keep the books of Nabcor?

A No, I did not.

Q Who kept the books of Nabcor?

A My bookkeeper.

Q From whom did the bookkeeper get the information with respect to cost, any costs, any cash disbursements that Nabcor had?

A He got them from car people.

Q Who were those people?

A Myself, people in New York, the office people in New York, and the office people in Philadelphia -- whoever was expended money in the normal course of business, Mr. Kleinbard. I am sure you have a business and you have expenses.

Q Did you have a controller and treasurer for Nabcor?

A No contoller, but we had a treasurer. It was Anthony Maiorana.

It was not his function --

Q I only asked you if you had a treasurer.

A Anthony Maiorana.

Q In what respect were you familiar with the records kept by the bookkeeper?

A First of all, the question was, Mr. Kleinbard --

MR. PERSON: Let me do the arguing. Try to answer his question. I'll pick it up from there.

A What was your question?

Q To what respect were you familiar with the financial records of Nabcor?

A At that time I was interested in cash flows and the monthly expenses. As far as individual items, I didn't go into that per se that I can recall to any great extent. I imagine that I did.

Q You didn't go into individual items to any great extent?

A That's right.

I imagine in the normal course of business I did look into what expenses were and things of that nature as a matter.

Q Is it your testimony that you did or didn't? Forget about the normal course of business. Did you look into the expenses?

A It was my practice to keep track of expenses and income, yes.

Q Were any reports furnished to you?

A I didn't go into the petty cash box and look into a 50 cent item or anything like that.

Q My question is just what it says. Did you get any reports from the bookkeeper as to expenses on a regular basis?

A No. We had some difficulties getting our bookkeeping program started. It was a new system. We asked Main Lafrentz, which was one of thelargest accounting firms in the world, to come in and set up a bookkeeping system for us in this type of thing, and after a month or so of looking overthe thing they sort of felt they could not do it. It was something different, outside the scope of what their knowledge was. There was no such thing as a brokerage system like ours, and we had to develop one.

We then had another bookkeeper.

Q You are telling us that Main Lafrentz was unable to give you financial information with respect to your business?

A That's right, Mr. Kleinbard.

Q Are you able to tell me as a result of your familiarity of the financial affairs with Nabcor what the gross profits, the gross sales, were for the fiscal year 1967?

THE COURT: I think this is beyond any voir dire. I think he was asked about efforts in costs in obtaining brokers.

I don't know whether he's going to testify as to specific dollar amounts expended literally in telephoning and entertaining or traveling with respect to broker by broker, or whether he's going to testify in more general terms, but I don't know that he's precluded from testifying simply because he didn't keep the books or was not the controller or something like that.

Let's go ahead with the direct and then you can cross-examine. Let's see what his testimony is.

Continue, Mr. Person.

BY MR. PERSON:

Q Do you recall when Joe Bente was put on as a Nabcor franchisee?

A Yes. In the spring of 1966.

Q Do you recall how much he paid for his franchise?

A I believe he paid $1500. $2500 for the franchise and $1500 down or $1000 down and he owed us 1500 or vice versa.

MR. KLEINBARD: I move to strike. It's so indefinite.

THE COURT: It certainly is.

Q Do you know who the franchise salesman was that had contacted Mr. Bente?

A I don't recall.

Q Did you have any discussions yourself with him?

A Yes.

Q Where did this take place?

A In the Westchester Townhouse.

Q Do you recall how much time you spent with Mr. Bente?

A Several hours.

Q Do you know whether anyone else in the organization spent any time with him?

A Yes.

Q Can you identify who, such person or persons?

A I believe one was Bernard Silverstein, who was the manager. I believe we had a man by the name of Mr. Silverman who I feel reasonably sure was the franchise man that --

THE COURT: What was the latter name?

THE WITNESS: Silverman.

THE COURT: Silverstein or Silverman?

THE WITNESS: Bernard Silverstein and Silverman.

Q Approximately how many hours did persons other than yourself in the Nabcor organization spend with Mr. Bente?

MR. KLEINBARD: I don't see how this witness can testify to that.

THE COURT: Were you present?

THE WITNESS: I was present during some of the time Mr. Bente was at the Westchester Townhouse while these men were having discussions with him. I knew it was several hours.

I do know at that time the marketing men went out into the field and they went into places of business, gas stations, garages, foreign car dealers, used car operators, and discussed this program with them, and then brought them in, made appointments and brought them in, for additional discussions; so I would say that the entire process was a good eight, ten-hour process of discussions and setting up of meetings and bringing them in, additional discussions and questions --

MR. KLEINBARD: I move to strike. I don't see how this witness is competent to testify as to what other people did. He said he was present on some occasions.

In addition to that, your Honor, we have no testimony as far as I know that any of these people are still Nabcor brokers so I think we are way past the period of the events to which Mr. Maiorana testified earlier this morning. I think it is, in addition to that, irrelevant.

MR. PERSON: I'm trying to show that Nabcor incurred a substantial expense in terms of the effort and also some monetary expenditure in putting these brokers on in, that they had value.

THE COURT: They had value? You want to have them evaluated? Kind of capitalized?

MR. PERSON: I want to show what Nabcor was in the business of doing at that time. This was the formation of the company.

THE COURT: I thought we did that before.

MR. PERSON: I'm trying to be more descriptive in terms of what effort, for purposes of trying to demonstrate the amount of time, the principals are expending in the business so a comparison can be drawn as to what time is left to handle other problems that are going to arise.

MR. KLEINBARD: I fail to see any connection between this and the issue to which the witness is supposed to be testifying, your Honor.

THE COURT: Say it again.

MR. PERSON: I'm trying to show what the activities of the management of the company were prior to its activities and what the activities were after the terminations that he has testified to, so that any decline in business activities can be attributed to the draining of the management efforts from what they had intended to do to the problems that were created not at their request.

THE COURT: Go ahead. I imagine we'llbe here Friday, but I have to proceed with the trial.

I want to tell you all that we will have a session Friday.

MR. PERSON: I'm not trying to go through every broker.

THE COURT: We spent a long time on Bente. I want the jury to know that we will be here Friday, so everybody make their plans.

MR. PERSON: I will try to make sure that we won't have to be here Friday.

THE COURT: You have to put on the case that you deem is necessary. You will be accorded all the time necessary, but we cannot have an extra day off. I'm sure you understand that.

MR. PERSON: I would urge your Honor not to hold it against me with the jury in terms of any extra days you want to assign. I'm not requesting it.

THE COURT: I'm ordering it, however.

Let's go.

MR. PERSON: I also move for a mistrial.

THE COURT: Denied.

BY MR. PERSON:

Q Was the amount of time that Nabcor spent in acquiring other brokers comparable to the amount of time that you described you spent in acquiring Joseph Bente as a broker?

A Yes.

MR. KLEINBARD: I move to strike that. I don't understand it.

THE COURT: Motion denied.

Q After the events that you testified to, the terminations in the early part of 1967, did Mr. Bente cease being a Nabcor franchisee?

A Yes.

Q Do you recall approximately when that occurred?

A I think it was in February or March of 1967.

Q Did Rizzuto Motors cease to be a Nabcor franchisee subsequent to the termination?

A Yes.

Q Do you recall approximately when that occurred?

A In that same time period.

Q That was what name?

A Rizzuto. He was an ex-Studebaker dealer in Long Island.

THE COURT: Proceed.

Q Do you know of any activities Mr. Bente engaged in after he terminated his relationship with Nabcor?

MR. KLEINBARD: I object to that. I don't see what relevance it has.

MR. PERSON: Can we see what relevance it has.

Q Did it relate to the automobile business?

A He stayed in the automobile business.

MR. PERSON: Hold it.

THE COURT: This is Mr. Bente?

What did he do in the automobile business? Do you know? Were you there? Did you observe him?

THE WITNESS: I had a conversation with him and this is what he told me.

THE COURT: I'll sustain the objection.

MR. PERSON: I would urge that a person should be able to testify as to who his competition is in the business.

THE COURT: He went out and saw something. Have him tell what Mr. Bente told him, I don't understand that you can put that in. Do you want to call Mr. Bente or have somebody here who observed Mr. Bente, or something like that? It may be relevant, it may be competent, but this is not.

Q Have you seen any documents that came from the business that you believe Mr. Bente had?

MR. KLEINBARD: I object to that. It's the same thing.

THE COURT: Sustained.

Q Do you know a Mr. Soloff? You have testified about Mr. Soloff.

A Yes.

Q Did he terminate his relationship with Nabcor subsequent to these terminations of dealers?

A There was a prior problem with Mr. Soloff as a result of deliveries. He came back when we were starting to get deliveries. He came back to see if we were going to get a normal source of supply. At that time everything exploded. We were not able to supply our other brokers and he left us. He went in for himself.

MR. KLEINBARD: I move to strike the answer.

THE COURT: Stricken. It's too vague. I don't understand it. It's not tied to any time. I don't know whether it's within the damage period or outside of it. You can go into it if you ask him questions that are tied to specifics.

Q Did you observe his activities subsequent to these terminations that you testified to?

A Yes.

THE COURT: Subsequent? Subsequent could mean any time up to the present.

MR. PERSON: I wanted to get in the time frame.

Q When was this?

A That he told me that he didn't want to be a broker?

MR.KLEINBARD: Did you observe something about Soloff?

THE WITNESS: Yes.

THE COURT: When did you observe it?

THE WITNESS: In the summer of '67.

Q Could you state what you saw?

A I saw him in the business of selling new and used cars. In fact we went to lunch together and he told me --

MR. PERSON: Don't say what he told you.

A I saw his operation.

Q He was selling new cars?

A And used cars.

Q And he was formerly your franchisee?

A Yes.

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Q Attainment or Tedesco ceased as a Nabcor franchisee after these terminations, is that correct?

A Yes.

Q About when?

A At about this same time.

Q Just approximately?

A I believe it was March of 1967, March, April, in that time period.

Q Midland Management, did they cease being a franchisee subsequent to the terminations?

A Yes. I believe also approximately March, April, the Spring of 1967.

Q New York Auto Brokers?

THE COURT: After Tedesco you mentioned what?

THE WITNESS: Midland Management.

THE COURT: And the next one?

MR. PERSON: New York Auto Brokers.

THE WITNESS: There was some more on Midland Management, if I can elaborate on it a little bit.

Q May I ask a question?

A Go ahead.

Q Did you have, observe anything with respect to Midland Management after the termination?

A I didn't observe an operation, but one of my men, Ed O'Brien, joined Midland Management in a partnership --

THE COURT: Wait a minute. One of your men, Ed O'Brien, what did he do?

THE WITNESS: He went in with the Kelleys who owned Midland Management, since we couldn't get supplies, he had been in the automobile business, and in fact --

Q Did he leave Nabcor?

THE WITNESS: He left Nabcor.

THE COURT: And went to Midland Management in a new phase of the auto business?

THE WITNESS: Right.

THE COURT: Is that what you are saying?

THE WITNESS: Yes.

Q New York Auto Brokers terminated as a Nabcor franchisee subsequent to these terminations or dealings?

A Yes.

Q Approximately when?

A Again in the Spring of 1967.

Q Arctic Motors, Ippolito?

A Yes.

Q Approximately when?

A I believe it was around January, February of

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1967.

Q Goldfeder?

A Yes, he also terminated. I believe that it was in mid-1967.

Q Rigotelli?

A Rigotelli terminated also. I would say it was possibly mid-1967 or so.

Q Al Skinner?

A Al Skinner, he terminated, I would say, about August or September of 1967.

THE COURT: Will the lawyers come up a minute, please.

(At the side bar.)

THE COURT: I really do apologize about that remark about Friday. I think it was uncalled for and I will state that to the jury.

I say it is partly uncalled for, but anyway, I will tell the jury it was entirely uncalled for.

But now, look, I was worried when I thought maybe you were just attempting to go practically broker by broker over the whole list and the whole history, which you are not doing.

The only question I raise with you, Mr. Person, is this: that there is nothing wrong with this line of inquiry. The only thing is this:

I don't know how to ask the question, but are you going into the available record sufficiently so that you know something about what happened with these brokers?

In other words, it could be a group of brokers terminated in early 1967 and certainly it could be that it was because of some difficulty in getting cars from Nabcor.

On the other hand, so many cars were in fact obtained that I worry about that, and there obviously might be other reasons besides failure to get cars which explain terminations. They may have any one of 5000 reasons.

Are we just going down a line of testimony simply to end up with cross-examination that will reveal a lot of things that he has not told us? Because that is a little bit wasteful of time and I am worried about time at this point.

MR. PERSON: All I am trying to show is that the business effectively was not a business as a result of the late 1967, early 1967 multiple refusals. The refusals that took place all took place about that time and effectively destroyed the business at that time.

THE COURT: But what happened after that?

MR.PERSON: It was a dying person grasping to try to stay in business. It wasn't effective as a business at that time, the damage had been done as a result of these refusals all coming at the same time and created a financial condition to the company that it never did overcome.

THE COURT: That is a good story if it holds up, but I heard that kind of thing before.

I just don't want to spend a lot of time on direct and go through with what we had, for instance, on Bolling.

MR. KAPLAN: Just for starters, half of these people, he answered interrogatories and half of these were never listed. That is just for starters.

THE COURT: What are the furthers?

MR.KAPLAN: He had litigation with some of them, all kinds of problems. Some of them submitted orders long after the period he is talking about. He did, in fact, get supplies.

THE COURT: Let me ask you this: as far as your further proof of this kind with Mr. Maiorana, is this the main period you are going into as far as this kind of proof?

MR.PERSON: That is the primary emphasis.

THE COURT: This presents an issue, at least it is clearcut. I will explain to the jury and I am very sorry, Mr. Person.

(In open court.)

THE COURT: I apologize to Mr. Person. It was really uncalled for to speak about the Friday session and any implied criticism of Mr. Person or laying the blame on him. It was just uncalled for and I am sorry to have done it.

I was concerned about possibly an expansion of the evidence beyond what I thought, but my concern was unfounded and Mr. Person is proceeding along certainly at the best rate he can, and so there will be no sitting on Friday, and whatever remarks I made was certainly on my own hook and that is the end of it.

2 BY MR. PERSON:

Q With Alf-Lex they ceased doing business after the terminations?

A Yes.

MR. KLEINBARD: Could we have when, your Honor?

THE COURT: I think in each case, although it is now plain he is talking about the same time period, you better ask him in each case, because after the terminations could mean any time up to the present.

MR.PERSON: Correct, your Honor.

Q Do you recall approximately when the last order was received from Alf-Lex?

A No, I don't. I will have to refresh my recollection on that by looking at the records.

Q With Chuck Cohen, he was a franchisee before, and did he terminate his relationship subsequent to the termination of dealings?

A Yes.

Q Did he have any other ventures after that you are aware of that related to the automobile business?

A Yes. He came to work for Nabcor. We lost employees and couldn't get a supply for him, and I gave him a job to try to get us some other sources of supply.

Q With Mr. Vanderzee, this was a franchisee, I gather, is that correct?

A Yes.

Q He terminated his franchise after these terminations of dealings?

A Yes.

Q Do you know approximately how long after?

A If I recall, by the Spring of '67 we were no longer doing any business with Mr. Vanderzee.

Q Approximately how long after a franchisee submits an order does the entire relationship terminate?

MR.KLEINBARD: I object to the form of that question.

A About three months, I guess.

THE COURT: I understand what you are getting at, but I don't think that is the way. I wouldn't understand what that meant.

Let me ask you this, Mr. Maiorana. Let me just state it depends on what happened. In other words, it could be that somebody just gave their order and that order was filled at a certain point and no more orders came in, nothing more was heard from him.

It could be that there were no orders since -- I don't know, let's just say hypothetically October, 1966, but there hadn't been any regular pattern of orders anyway and all of a sudden in April or May he writes a letter and says, "I terminate."

I am just speaking hypothetically, because I don't know what happened. But my problem with the question is that I don't know whether you need to get specific, but it doesn't mean much unless you are talking about a specific problem or instance.

I think we do know if you simply want to ask him what is a typical time for filling an order, something like that, and then apply it to a situation, why, then, maybe you could ask that.

BY MR. PERSON:

Q Mr. Maiorana, what is the typical time for filling an order,and I might ask you, first of all, as with a franchised dealer, what typically should a franchised dealer, how long should it take a dealer to fill a typical order for a new automobile?

A 28 to 30 days.

Q Approximately how long, if you know, did it take for Nabcor to fill a typical order they got from its own franchisee?

MR. KLEINBARD: I object to that, your Honor. It is all in the books.

A 50, 60, 70, 80 days.

THE COURT: I don't know --

MR. PERSON: It is his business.

THE COURT: I will allow it. It should be in the records, but that is subject to check.

MR. PERSON: We have made that compilation.

THE COURT: What do you say the time

generally, from what to what, that Nabcor placed the order until the time that Nabcor got the car?

THE WITNESS: Your Honor, I am placed in a position, I have spent 30 years in the automobile business and I am being placed in the position of answering questions that need explanation, that require explanation for this jury to understand.

THE COURT: Just a moment. Your counsel asked you if you knew if there was a typical time. If there isn't a typical time and if it is a matter of individual circumstances, we have abundant opportunity to present the statistics.

But if there is a typical time, go ahead and give it. Was there a typical time?

THE WITNESS: Are you asking me my experience as a dealer myself?

THE COURT: At Nabcor, was there a typical time that it took Nabcor from the time to order a car from a dealer until the time you got delivery?

MR. PERSON: May I say average time?

THE COURT: All right, average, whatever you want to say.

THE WITNESS: I would say an average of 60 days or more.

Q We have done a compilation, so I just want to test your understanding of it.

THE COURT: All right.

Q Was Mr. Silverstein employed by Nabcor in 1966?

A Yes.

Q Did he leave the employment of Nabcor?

A Yes.

Q When?

A In the Summer of 1966.

Q By that time in the Summer of 1966 had Nabcor had any terminations of dealings?

A Not that I can recall -- we had had some refusals.

Q Don't call it refusals because they objected violently, just say terminations.

THE COURT: They mean different things. I thought in this line of questioning you were talking about terminations in the course of dealings.

MR. PERSON: Correct, your Honor.

THE COURT: So we understand what that means.

A No.

THE COURT: Had you had any by that summer of '66?

THE WITNESS: No, your Honor.

THE COURT: Next question.

MR. PERSON: I would like to be able to show instances where we have claimed cancellations of automobiles and be able to tie them in to the specific brokers that were named.

MR. KLEINBARD: Can't he just ask questions, your Honor?

THE COURT: Go ahead.

Q Mr. Maiorana, was SMC or Stanley Simpson a franchisee during 1966?

A Yes.

Q Do you recall whether he had ceased being a franchisee?

A Yes.

Q Approximately when?

THE WITNESS: May we have a brief recess, your Honor?

THE COURT: We will take a short recess now.

(Recess.)

(Jury in box)

THE COURT: Please proceed, Mr. Person.

MR. PERSON: I offer Plaintiffs' Exhibit 453 in evidence.

MR. KLEINBARD: May we have a foundation for this?

THE COURT: Let me see it.

(Pause)

THE COURT: Is this from the log?

MR. PERSON: It was compiled by Nabcor at that time as records of cars that were on order.

THE COURT: I think you have to lay a foundation. See if this witness recognizes it, and so forth.

BY MR. PERSON:

Q Take a look at this exhibit, 453.

(Pause)

Q Do you recognize that document?

A Yes.

Q Was that a document prepared in the ordinary course of business by Nabcor?

A It was a document that was prepared at that time. Whether this was a monthly document or a part of a consistent procedure, I could not say.

Q What does that exhibit have on it?

A All the Colonial Cadillac orders, Don Allen --

THE COURT: The question is a foundation for its admissibility.

A If I recall correctly, these were problem cars, cars that we were having problems with, delays and things of that nature.

MR. KLEINBARD: I move to strike. There is no question pending.

THE COURT: I'll deny the motion.

Q Did Nabcor prepare documents in connection with cars with which it was having problems?

A Yes. We had a lit of pending orders where the brokers would call. We promised delivery in four to six weeks --

THE COURT: He asked simply --

Q Did Nabcor prepare documents that related to automobiles that were on order that were having problems or awaiting delivery?

A Yes.

Q Was that document prepared in that connection in the regular course of Nabcor's business?

A Yes.

Q Was it the ordinary course of Nabcor to prepare documents such as that?

A Yes.

MR. PERSON: I offer this in evidence.

THE COURT: Any objection?

MR. KLEINBARD: I object, your Honor. I think the witness previously said he didn't know how it was prepared. There has been no testimony thathe has prepared it.

THE COURT: He has now said it was a Nabcor record kept in the regular course of business.

MR. KLEINBARD: Do we have any other such documents? I would like to see other documents of this nature that have been prepared, if you have it, Mr. Person. If it's a document prepared in the regular course of business, you should have it throughout the period.

MR. PERSON: We have turned over whatever documents we have.

THE COURT: The question is, do you know of any other such documents?

MR. PERSON: I can recall some.

THE COURT: Do you have them? May I see this document, please?

(Pause)

THE COURT: I'm going to admit the document unless you have further voir dire. Do you have further voir dire?

MR. KLEINBARD: I would like to ask who prepared this document.

THE COURT: Sure.

Do you know who prepared it?

THE WITNESS: I believe it was prepared by our office.

VOIR DIRE EXAMINATION

BY MR. KLEINBARD:

Q By your office?

A Yes.

Q Can you name the individual who prepared it?

A I can't recall who prepared it.

MR. KLEINBARD: Your Honor, I submit --

THE COURT: The thing is, it seems on its face the kind of document that the company would keep. It is certainly subject to check as to other documents.

I'm going to admit it.

(Plaintiffs' Exhibit 453 was received in evidence)

xxx

BY MR. PERSON:

Q Mr. Maiorana, do you recall from that exhibit what Colonial Cadillac orders were outstanding on January 6, 1967?

THE COURT: The exhibit is in evidence. It can be read to the jury.

MR. PERSON: I would like to be able to have him recite what is on the exhibit.

THE COURT: Why?

MR. PERSON: For safety's sake. I would like to have him testify to it, if I can.

THE COURT: The question is, do you now recollect, do you have a recollection, of the orders outstanding order by order with Colonial Cadillac?

THE WITNESS: I have a recollection that all of the orders on this date, your Honor, were outstanding and undelivered.

THE COURT: I guess all the orders that were outstanding as of the date were outstanding. That does not add anything to our knowledge.

Do you have a recollection of these specific ones?

THE WITNESS: Yes.

THE COURT: Could you sit there and recite?

THE WITNESS: Yes.

MR. KLEINBARD: Without the document.

THE WITNESS: SMC's orders were outstanding, J&B -- I would have to have the name of the broker. I don't recall.

THE COURT: Let's not waste time with this.

Q In other words, you had orders from these brokers which were outstanding as of this date, January 6, 1967, with Colonial Cadillac?

THE COURT: Get me a copy of that.

MR. PERSON: Yes, your Honor.

I would like to show the jury this. This is fewer than 43 or 44 Cadillacs --

THE COURT: They have heard the evidence.

(Pause)

MR. PERSON: I would like to ask if Mr. Kleinbard will stipulate to the other orders that were mentioned in this history of Nabcor new car orders which we have marked as an exhibit.

THE COURT: You mean 699 for identification?

MR. PERSON: Yes, your Honor.

THE COURT: What is the stipulation requested?

MR. PERSON: That the orders that are

reflected in these exhibits in fact were orders that were cancelled as a result of the activities of the terminations.

MR. KAPLAN: Only if the plaintiff will stipulate to dismissing the case.

THE COURT: Let's not have that kind of remark.

I don't think they're going to stipulate.

MR. PERSON: It should be subject to a stipulation. This is not really --

THE COURT: Mr. Person, there may be some things in there that can be stipulated and some things not. That has a lot of information. I know we have statistical materials from Paul Weiss. I think the only way to get those things in is to have someone get on the stand and testify as to the derivation of the materials in there, that they're taken from records in evidence. If that is the case, then they can go into evidence as summaries. If you were personally the person who created them, well, we can have the mechanics for having your representations come before us. I think that's the basic thing.

In other words, if the information in there is in toto taken from documents in evidence, then they should come in. If it's not and if it's other things, then there is a problem. That's the only way I know to handle it. I think that's the way that the Paul Weiss material will be handled, and they will be tested by the same test when the time comes.

BY MR. PERSON:

Q Do you recall dealings with Pitcairn Oldsmobile?

A Yes.

Q Do you recall whether Pitcairn Oldsmobile and Nabcor were dealing with each other at one time?

A We reached an agreement to deal with Picher, who was the manager there.

THE COURT: What is the next question?

MR. PERSON: There is an order at page 38 of the plaintiffs' log, Exhibit 450, line 6, which indicates that a car had been ordered from Pitcairn Oldsmobile on September 30, 1966 and I see by the date that actually I should not be raising this since it falls outside of the four-year period.

THE COURT: Let's let that go then.

MR. KLEINBARD: Did he mention it was delivered, as long as he raised it?

THE COURT: It was ordered and delivered

outside of the relevant period.

Q Do you recall the transaction with Pitcairn Oldsmobile?

THE COURT: If you are claiming something wrong then you can't say it. If you are claiming it was all right we are glad to have you say it.

MR. PERSON: It's damage outside of the period.

Q Do you recall whether any orders had been placed with Pitcairn Oldsmobile?

A I believe we did place an order but I was told by Pitcairn that we didn't have a fleet certificate.

MR. KLEINBARD: I object to that.

THE COURT: Yes.

Q Did you get the car from Pitcairn?

THE COURT: Pass that. Let's get to the items in the damage period. I think you recognize that, Mr. Person.

Where do we go from here?

MR. PERSON: Mr. Kaplan, will you stipulate that with respect to the orders on order at Don Allen Chevrolet of ten automobiles only two were received through Don Allen?

MR. KLEINBARD: We can't stipulate to that, your Honor.

MR. PERSON: Midtown, rather.

MR. KLEINBARD: No, your Honor. What happened to these cars, whether they were cancelled by Nabcor, or anything else, I don't know.

THE COURT: There is very detailed evidence about that. Isn't there testimony about cancellations by Nabcor?

MR. KLEINBARD: Yes.

THE COURT: I think the situation, Mr. Person, is that that is an incident where you claimed the problems or the non-deliveries were the fault of Midtown and General Motors, and General Motors claims that any problem about delivery, or any cancellation, was the voluntary cancellation of Nabcor, so those are issues that depend on evidence; but you can inquire about any damages that you claim flowed from the failure to obtain those cars, and then the jury can decide whether the damage claims are relevant, whose fault it is,and so forth.

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MR. KLEINBARD: Your Honor, so I don't have to keep jumping up and down, may I have a continuing objection to any testimony about the dealers, whether they ceased to do business or not, for the reasons that I have stated earlier at the side bar? I think they are irrelevant as to us.

THE COURT: I think the jury has been told many, many times. I think we understand your position.

MR. PERSON: I am trying to keep it to the damages.

THE COURT: I know you are. That is fine.

MR. PERSON: We have nine orders that had gone to Mid-Town which are in the books, that is the Nabcor log.

The log does not indicate that the automobiles had been received by these customers after the termination of dealings with Mid-Town Chevrolet.

Two automobiles had been received from Don Allen, from Mid-Town Chevrolet, according to the log. But we have other transactions with Mid-Town for which the same result was not true.

THE COURT: But there was correspondence on this. Isn't that in the records?

MR. PERSON: Will you stipulate --

THE COURT: Let's get the documents now.

MR. KLEINBARD: Here it is, your Honor. It is Defendants' Exhibit P.

THE COURT: In evidence now?

MR.KLEINBARD: In evidence.

THE COURT: Let me see that, please.

(Handed to Court.)

THE COURT: Mr. Person, it seems to me this ties it up pretty well and permits both parties to argue as to who was responsible.

MR.PERSON: I am not trying to pin responsibility.

THE COURT: But I just think this letter helps lay the foundation for whatever further inquiry you want to make and if I am correct it is now in the record and I think this established that there were 10 cars that were originally ordered from Don Allen, which orders were inherited by Mid-Town.

And that, without trying to say whose fault it was, that the orders were not filled or cancelled and the fact is that two of those orders were filled by Midtown and eight were not.

I think it is agreed that two were filled and the exhibit, Defendants' Exhibit P, shows the cancellation of eight. The order numbers are given.

MR. PERSON: I would like to have them stipulate the eight orders were not delivered to customers by any dealer.

MR.KLEINBARD: I just don't know, your Honor.

THE COURT: I don't know how far they can go. All I know is what I do read in the letter.

MR.KLEINBARD: I am prepared to go as far as the letter goes.

MR. PERSON: I wasn't disputing that. I was really trying to go to the next step after that. Maybe I can ask the witness.

THE COURT: They are not stipulating.

BY MR. PERSON:

Q Mr. Maiorana, are you familiar with the eight orders out of the 10 not received from Mid-Town Chevrolet?

A Yes, I have a recollection of that particular situation, Mr. Person.

Q Do you know if any orders had been placed with any dealers after Mid-Town Chevrolet?

A To the best of my recollection, they were all cancelled because of the --

THE COURT: That wasn't the question. Just take it step by step.

Were any of the eight orders where there was cancellation or non-delivery by Mid-Town, were any of those orders subsequently placed with another Chevrolet dealer? Were any of the eight? What is the answer to that, or don't you know?

THE WITNESS: There may be one or two, but to the best of my recollection they were all cancelled, your Honor.

THE COURT: I really asked you to take it one step at a time.

THE WITNESS: I think we did try to place some of them with other dealers.

THE COURT: How many did you say, one or two?

THE WITNESS: I really don't know. There were a few. I would say maybe 50 per cent or less were placed with other dealers.

THE COURT: Am I correct you really don't know?

THE WITNESS: I know, I feel, I vaguely recollect, your Honor, that some were placed with other dealers. We did try to make attempts to get some of them and some were cancelled.

THE COURT: He has a vague recollection -

some were placed with other dealers.

BY MR. PERSON:

Q Do you know if any of those orders that you believe may have been placed with other dealers customers had received their cars from these other dealers?

A No, I think we lost all of those orders. They were all cancelled.

Q Cancelled by whom?

A By the customers.

Q For what reason?

MR. KLEINBARD: I object, your Honor.

THE COURT: Yes. You just can't ask the witness that way.

MR.PERSON: I don't know how else in this case.

Q How long was it, approximately,when the orders were cancelled after the orders had been placed, if you can recall?

A Almost three months, I guess. Two or three months.

MR.KLEINBARD: I move to strike the guessing, your Honor.

THE COURT: I just don't think the specifics are developed. We are lumping eight transactions together, and surely I would assume Nabcor has some records on these things. I just don't think we can lump eight together.

I am going to have to recess early, in about five minutes. Can you fill another five minutes, Mr. Person?

MR. PERSON: Yes. I want to go over the Mid-Town orders through the log to show what the log itself states concerning these orders.

THE COURT: All right.

MR. PERSON: I would like to point out that on page 38 of this log, Order No. 133, Don Allen-Mid-Town, indicates cancelled, and has no entry which would indicate that any car had been received by Lou's Auto.

Also at line 35, Don Allen-Mid-Town, cancelled SMC, Order No. 145, with no indication of receipt.

Page 39, Order No. 146,similarly. There is an entry for an automobile, Don Allen-Mid-Town,delivered at line 26,January 13, 1967.

On the following page 40, line 2, Don Allen-Mid-Town, cancelled, Order No. 179.

Then line 6, No. 184, Don Allen, delivered

January 17, 1967.

Line 8, Order 185, Don Allen, cancelled, with no indication of delivery.

MR. KLEINBARD: Could Mr. Person say when the order was cancelled?

THE COURT: This is perfectly okay.

MR.PERSON: Line 12, Order 188, Don Allen-Mid-Town, cancelled, and no indication of any delivery.

The following line after that, 189, saying "Entries."

Line 15, Order 181, Don Allen Motors, cancelled, no indication of any delivery.

There is a date below the cancelled in the next line,and I assume that relates to --

THE COURT: That is a different car.

Let's adjourn now until 2 o'clock, please.

MR. PERSON: Just, if I may, your Honor, on line 3 of the following page there is also a similar entry with no indication of delivery.

THE COURT: All right, 2.00 P.M.

(Jury left the courtroom.)

(Discussion at the bench, off the record.)

THE COURT: I asked Mr. Person, and I will confirm on the record, that we started the deposition of Mr. Rock,and I assume he may have other materials on general practices, about fleet certificates, allotments and so forth.

2 I reiterate that I am not in any way trying to cut you off, Mr. Person, from making yourrecord on general practices because it may be extremely important and valuable to have, I just don't know.

All I am saying is that for the sake of speed and clarity that I would urge you, if there is anything that you want to put in evidence, to complete your record on general practices, I assume that you know what it is that you want to put in and I would simply draft a statement of what that is, show it to Mr. Kleinbard and Mr. Kaplan and see if they won't agree.

Because I am sure that if you are correct on anything, they will stipulate on these practices. That certainly has been done so far. I think it is the better way to do it.

The problem I have with the Rock deposition is that you kind of go back and forth between things that expressly talk about Buick and things that don't expressly talk about Buick, although I assume they are meant to refer to Buick.

If there is a problem about Buick policy versus some other division's policy, that is something that General Motors counsel should be thoroughly acquainted with and it is for the benefit of all of us to have that material precise.

I reiterate I think it is very much to the benefit of everybody in the trial to have you draft up what you want to prove, what you think is proven in the depositions you intend to read or whatever, and submit it to Mr. Kaplan and Mr.Kleinbard and they can check it out very quickly and then it can be stipulated.

If, indeed, you do have disagreement, you have something they won't agree to, and it is admissible or something like that, of course, you have to read your deposition. But try to work on general practices through stipulation.

If there is anything in the Rock deposition or the Berg deposition or in any other depositions that relate to discussions, actions, specifically about Nabcor, of course that is a different matter.

See you at 2 o'clock.

(Luncheon recess to 2.00 P.M.)

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AFTERNOON SESSION
2:00 p.m.

(In open court; jury present)

FRANK MAIORANA resumed.

THE COURT: Let's proceed.

MR. PERSON: I hand to your Honor a copy of Plaintiffs' Exhibit 453 in evidence, and I also give copies to the jury.

(Pause)

DIRECT EXAMINATION CONTINUED

BY MR. PERSON:

Q Mr. Maiorana, can you tell us what the effective nature is on the business of Nabcor with respect to any delays in the receipt of automobiles?

MR. KLEINBARD: Can we have a less general question, your Honor?

THECOURT: I think it would be more helpful to phrase it in the past tense.

Q Can you identify any added activities or any added costs which result from a delay in the receipt of an automobile ordered by Nabcor?

A It resulted in many cases the lost of our franchisee. It resulted in some cases --

THE COURT: Mr. Person, I have to say

that I don't think it's useful to have these generalizations: "In some cases." I don't know what time he is speaking of. I don't know what the cases are. It would be impossible for me to deal with it. It would be impossible to cross-examine. It can't be. We have to have more specific testimony.

THE WITNESS: I can give specific instances.

THE COURT: You ask the questions.

Q Do you know of any instance where the delay in the receipt of an automobile resulted in a cancellation of an order by a customer?

A Yes. In the case of Arctic Motors. There are many others. I assume I'm confined to speak of one specific instance.

THE COURT: You are not confined. Mr. Person is going to ask the questions.

I'm saying, Mr. Person, that you just have to draw out specific information.

Q Do you recall what that transaction was?

A There were about ten of them in the Arctic Motors case. Most of them were Cadillacs. There were a couple of Chevrolets. We lost Arctic Motors as a franchisee.

We also got involved in a lawsuit with Mr. Ippolito who was the owner of Arctic Motors, the franchisee, which resulted in a payment to him, a settlement to him, of a refund of $3500.

MR. KLEINBARD: I object to the term "settlement," your Honor. He may have settled for a whole variety of reasons.

THE COURT: I don't know what your last question was but it seems it's a little beyond that.

Again, Mr. Maiorana. for good order's sake, just listen to Mr. Person's question and you answer it, and he'll ask the next question, and then we can take it one step at a time.

Q Was Nabcor aware of the length of time that automobiles remained on order with franchised dealers?

A Yes.

MR. KLEINBARD: Same objection. It's very broad.

THE COURT: Overruled.

Q This is true of GM franchised dealers back in the period 1967 through the end of 1970?

A Yes.

By that you mean the time that it would take for a franchised dealer to order an automobile for that car to be delivered to his place of business?

Q Yes. My question was: Was Nabcor aware of the length of time that the order was outstanding with the dealer?

A Was outstanding?

THE COURT: I don't know what this "aware" means. I would assume that Nabcor had some record of when it placed the order, and the log indeed has a column which you argue reflects the date of order from the dealer. I don't know what that adds to anything we know already.

MR. PERSON: I am trying to ask the witness: Did there come a time when an order was outstanding for a certain length of time that any action would be taken or was taken by Nabcor concerning the outstanding order?

Q Can you answer that?

A Generally --

Q May I ask you to describe what action was taken?

A We called the dealer after the fourth week to find out just what was transpiring with that particular order: Did they get an item number on it? Was the car in? Had the factory sent them notification that the car was being built or shipped or whatever, because it should have been in that fourth week, either in the dealership or enroute, or at least they should have had notification that it was going to be built on a certain day or whatever.

Q Did Nabcor communicate with GM dealers more than once concerning a specific outstanding order?

THE COURT: Which order?

Q Can you recall any specific order in which Nabcor communicated with a GM franchisee more than once concerning an order?

A Yes. A Colonial Cadillac, a blue cadillac, for Arctic Motors, Ippolito. There was a customer that wanted the car. He was buying it for his wife for Christmas.

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MR.KLEINBARD: I object to it, your Honor.

THE COURT: Did you inquire more than once of Colonial?

THE WITNESS: Yes, he was calling almost every day and I was calling Colonial every day.

Q With respect to this automobile, did you have any communications with Arctic Motors, your franchisee?

A Yes.

Q Did you have any communication with the customer of Arctic Motors, if you can recall?

A No, I just spoke with Mr. Ippolito.

Q Did you speak more than once?

A Yes.

Q Is this typical of transactions involving delays in delivery?

A Yes.

MR.KLEINBARD: I object to that, your Honor. I don't see how an individual experience can be typical.

THE COURT: I think he means did they try to check up and do it more than once.

MR. KLEINBARD: He already so testified.

THE COURT: Next question.

Q Did the time spent in doing this have any value? Did it have any cost to Nabcor?

A Yes.

Q What was the measure of that cost?

A Time, telephone calls. At that time we were allowing our brokers to make collect calls to us on any problems they had and they might call a couple of times a day on an automobile or something and they would call collect. Our expenses would run high.

My time and employees' time, calling the source of supply might be another toll call, and things of that nature.

If we were shut off, the problems of getting additional sources of supply, calling Philadelphia --

THE COURT: He asked you about time and cost of follow-ups on delays. Let's stick to the question.

Go ahead, Mr. Person.

Q During this period did you have regular managerial activities with respect to Nabcor?

A Yes.

Q Could you just very, very briefly describe what these activities were during this period?

MR. KLEINBARD: Can we have the period?

Q Could you state what period you are referring to?

A I am referring to the period from mid-December through --

THE COURT: 1966?

THE WITNESS: 1966.

THE COURT: All right. Through what?

THE WITNESS: Through April, May.

THE COURT: What year?

THE WITNESS: 1966. There was management after and before.

THE COURT: You ask a question. He defined the period.

Q Can you describe what specific managerial activities you were performing on behalf of Nabcor, and please be very, very brief.

A That I was?

Q Yes.

A Well, starting from early morning until late at night, having conferences with Philadelphia and various managers, handling complaints, delayed automobiles which managers couldn't take care of. I would get on the phone to see if I could expedite it in some way.

Overlooking the franchise activities of the company, trying to hold the organization together while we were losing the automobiles. Making sure that the --

MR.KLEINBARD: I move to strike.

A (Continuing) With trainees, there were lots of discussions about our ability to get automobiles and to try to reassure the brokers that we would resolve our problems and told the customers to hold off on the orders, we would try to reorder them for them or find locates and a myriad of things that operate a business.

2 Q Did the added activities during this period resulting from these terminations of dealings, did that amount to a substantial part of your time?

A Yes.

MR. KLEINBARD: I object to it. I don't know what added activities he is talking about.

THE COURT: Objection overruled.

Q Was there any effect that these added activities had on Nabcor in your ability to perform the regular business activities of Nabcor?

A Yes.

Q Do you recall what your overhead expenses were in Nabcor during, say, 1968?

MR. KLEINBARD: Your Honor, there are records on this. I don't see why we have to have this.

THE COURT: Do you have the financial statements?

MR. PERSON: In 1968, Exhibit F-6, the offering circular of National Auto Brokers Corporation indicates that for the fiscal year ended January 31, 1968, that would be basically the year 1967, the selling, general and administrative expenses for Nabcor are set forth here as $117,908.

I would like to characterize that amount as overhead expense if I have no objection from my opponents here, just to be able to characterize it.

MR. KLEINBARD: It is what it is. It is selling, general and administrative.

THE COURT: Can we call it all overhead so he doesn't have to repeat those words?

MR. KLEINBARD: I don't think it is.

Q Mr. Maiorana, let me show you --

THE COURT: It is called selling, general and administrative expense, but you go ahead.

Q Would this amount of administrative and selling and overhead expense, is that amount something that you have labeled in your business? Do you have some term that refers to that?

A This is overhead, this included --

THE COURT: All right, go ahead, Mr. Person. What is your question?

Q Was there any basis on which Nabcor had this overhead expense?

THE COURT: I don't understand that.

Q Was there any reason for the amount of this overhead expense?

THE COURT: In 1968?

Q Yes. Any basis on which this overhead expense was established?

THE COURT: Just hold on. At the very least the time has to be fixed. The figure you read, maybe you gave it, but I didn't hear --

MR. PERSON: February 1, 1967, to January 31, 1968. That is the fiscal year.

THE COURT: Ask your question again.

Q Was this overhead expense related to some business objective of Nabcor?

A Yes.

Q Could you state what that was?

A To maintain our system and expanding it, moving it into other areas. We had severe problems in New York.

MR. KLEINBARD: I move to strike, your Honor, "severe problems in New York."

THE COURT: This is so general we are going to be here a long time if they have to cross-examine about that. Relate it to the case.

Q Can you approximate the number of franchisees you had at that time?

A Well, we had very few, because we created master distributorships and turned it over to Turco in -- all of the New York brokers to Turco, of which only two or three were active at that time, to see if he could revitalize it and reduce that expense, and we went into establishing new brokerage areas in Pittsburgh, Buffalo and Chicago at that time.

THE COURT: May I have that answer read again, please?

(Answer read.)

Q Was your overhead expense related, was it designed to cover, the operations under your franchise system for distribution?

A Yes.

THE COURT: I don't know what that means. What do you mean?

THE WITNESS: We had lost so many brokers we were trying to get more brokers.

THE COURT: Let me hear the question. Maybe I can understand it.

(Question read)

THE COURT: Proceed, Mr. Person.

Q In running your franchise system did you have expenses?

A Absolutely yes.

Q Were these expenses included in the overhead expenses?

A Yes.

Q Did your overhead expenses cover a number of franchisees, that is were they designed, the overhead expenses, to be able to cover the expenses incidental to a number of franchisees?

A Yes. We had men before --

THE COURT: I think we ought to shortcut

this. I think I understand, but can't you ask it more directly?

You are asking about whether they had a certain administrative setup, maybe other kinds of setups, designed to relate to a particular volume of business, and if that volume of business shrinks, are they still stuck with that overhead or administrative setup?

MR. PERSON: Correct.

THE COURT: It's a familiar problem.

Why don't you ask it in some way. See if it occurred here. I get the idea and the jury does too, I'm sure.

Q In addition to that, did youhave any --

THE COURT: In addition to what?. I wanted to indicate to you I know what you are talking about. You can ask it. Ask it in some plain form.

Q Was your overhead expense an amount which was fixed for some period of time?

A Yes.

Q Did you have plans with respect to your overhead expenses as to the number of franchisees and the volume of automobiles that this expense would be able to cover?

A Yes.

Q Did the brokers have any value? Did an individual broker have any value that you had assigned to that broker?

A Yes.

Q Can you state what the value was and how you made the assignment?

A Well, at the time we expected a broker to perform on the level of an automobile salesman. An automobile salesman sold one make and our brokers sold all makes and all models so we would expect to do as well. Our projections were based on 20.

THE COURT: 20 what?

THE WITNESS: 20 cars per month.

THE COURT: Per man?

THE WITNESS: Per man.

THE COURT: Per broker?

THE WITNESS: Per broker.

When I was a salesman -- and I was a salesman myself -- it was 25 to 30.

THE COURT: How do you figure in this case?

THE WITNESS: Being realistic, there are certain situations that will affect this sales ability: Some are not as aggressive as others, and so on and so forth. We took a percentage. The average salesman in the United States sells at least ten automobiles per month.

MR. KLEINBARD: I move to strike that. I don't think the witness is competent.

THE COURT: He's telling you how he derived whatever he derived.

MR. KLEINBARD: Then I would like an instruction that he's not testifying as to the truth of these facts. These are summations he has made.

THE COURT: I think that's clear.

A We have Automotive News and a lot of statistics --

THE COURT: Tell us how you calculated whatever it is that you calculated.

THE WITNESS: I took into consideration to take a figure of 50 per cent of what the average salesman in the United States could sell, which would be a very conservative figure.

THE COURT: You started out mentioning 20 cars per month.

THE WITNESS: Now we get down to five cars per month or 60 cars per year as an objective that we could expect in my mind, beyond any shadow of doubt, that they could achieve handling all makes and all models of new cars. Five cars was a ridiculously low figure. This was the value I placed on a broker.

Q What would that represent in income per broker?

A $3000.

THE COURT: To whom?

MR. PERSON: Nabcor.

Q $3000 per broker?

A Yes.

THE COURT: Per year?

THE WITNESS: Yes.

Q How many franchisees did you have at maximum including direct and indirect franchisees?

A Approximately 250.

Q At what point was that?

A About 1970. Even before that. Taking losses into consideration and replacement, we had 250 franchisees by that time,'69, '70.

Q Did the franchisees always pay in cash when they bought their franchises?

A No. I made it a point in most cases to interview each franchisee myself before we accepted him.

MR. KLEINBARD: I don't understand what this has to do whether they paid cash.

A I felt the franchisee had the potential of being a good broker for the Nabcor system --

THE COURT: Sometime you extended credit?

THE WITNESS: Yes.

Q And the credit took the form of what type of instrument?

A A note.

Q Did Nabcor have an amount of these notes on or before December 10, 1970?

A Yes.

Q I see there are some notes reflected in the financial statements which are in the offering circular, notes receivable, franchises, $40,315, at page 23, and also accounts receivable, franchises, $52,418.

THE COURT: I'm looking at page 23. What are the figures?

MR. PERSON: One is under current assets, notes receivable, franchises, note 2.

THE COURT: That's $40,315.

MR. PERSON: And there is --

THE COURT: This was as of January 31, 1971?

MR. PERSON: Yes. And the next item is accounts receivable, franchises, and the reference to the same note in the financial statements and that was an amount 53,418.

Q Did these receivables and notes that I have just referred to represent all of the notes or receivables that had been received by Nabcor throughout its history from its franchisees?

A No.

Q There were other notes then?

A Yes. A lot of them had been written off by that time. I would say therewas approximately $250,000 worth of notes altogether that we never recovered.

MR. KLEINBARD: I move to strike that again on the ground this is not competent testimony.

THE COURT: I deny that particular motion. Are we talking about writeoffs or inability to recover or what?

Q On what grounds were these notes written off?

THE COURT: He didn't say they were written off.

Q What happened to those notes?

THE COURT: He said there were some notes written off. There were $250,000 notes that they could not recover on.

Let's be more specific. You can bring this out.

Q Do you recall when some action was taken by Nabcor with respect to these notes that you refer to, not the ones in the financial statement I have referred to but theother notes we were talking about.

A Each year --

Q Did you have an accountant prepare financial statements for you in connection with the filing of a public offering?

A Yes.

Q When did that occur, the filing with respect to the public offering?

A The filing occurred in 1970. I believe it was maybe October or November of 1970.

Q Had the accountant in connection with this preparation of the financial statements spoken with you concerning some kind of disposition with respect to the outstanding notes?

MR. KLEINBARD: I object to the conversation between the accountant and the witness.

Q Didn't Nabcor take any action on or before --

THE COURT: Were there writeoffs? Isn't there a record of that?

MR. KLEINBARD: We have been all through this on cross originally.

THE COURT: I don't recall that.

MR. KLEINBARD: I remember asking it myself.

THE COURT: Do you have a record? Is there an accountant's statement that shows writeoffs?

MR. PERSON: I don't have it here, but we'll have it.

THE COURT: I don't understand that. You ask him the questions then. Let's get this over with.

You can ask him questions if you want to cover this, but I don't want to wait for some document that is not here.

Q To the best of your recollection can you state the amount of the writoffs that occurred with respect to these notes from franchisees?

A According to our accountant, we had written off about $250,000 worth of franchise notes.

Q What was the basis for the writoff as you recall it?

A We lost the franchisees and other reasons. Each year, if the franchisee was lost to us with no possibility of any recovery, of his coming back into the system, there was no way we could recover that note. It was written off. Of if -- some of them sued us. We had a dozen or so lawsuits, or more. That note was written off that year. There was no possibility of collecting that one.

So any notes that were in question where we lost a franchisee was written off in that particular year?

Q The offering circular shows on page 19 that as of the date of the circular, which was April 29, 1971, you owned 189,524 shares of Nabcor and that you had 54.15 per cent of Nabcor, and also your brother Anthony Maiorana had 74,640 shares or 21.3 per cent.

Was this percentage established prior to December 10, 1970?

A Yes.

Q Was there an intention prior to December 10, 1970 to raise money for Nabcor?

A Yes.

Q Did that result in this offering circular?

A Yes.

Q This is dated April 29, 1971?

A That's correct.

Q What was the result of this public offering?

A We raised $300,000 by giving away 40 per cent of the stock, of Nabcor.

MR. KLEINBARD: Objection. I move to strike "by giving away."

THE COURT: Was it sold?

THE WITNESS: It was sold.

THE COURT: You sold 40 per cent of the combined holdings of you and Anthony?

THE WITNESS: Of the entire.

MR. PERSON: I don't think that is correct.

THE COURT: 40 of all the stock?

MR. PERSON: I'll ask questions.

Q State who it is that sold the shares of stock to the public?

A Nabcor sold the shares.

Q Did you sell these shares, you or your brother personally?

A No.

Q Was there any effect upon the percentage of ownership you had in Nabcor as a result of public offering?

A Yes.

Q What was that effect?

A Well, it was reduced to the extent that my percentage went down to a little over 50 per cent of what it was and Anthony's to what his was, and we owned it all prior to that time.

Q The offering circular shows that your percentage after the offering was 37.9 and your brother's was 14.3. That's at page 19 of the exhibit.

What was the purpose of raising money for Nabcor?

MR. KLEINBARD: I think it is unnecessary to go into the purpose of raising of money for Nabcor in 1971.

THE COURT: He said the intention existed before December 10. I'll allow it.

A To raise money, to revitalize the system, to set up the brokerage system in a slightly different manner, put individual brokers in to set up computer outlets in each of these little -- we had the computer people in where they would -- wherever you call that:

it escapes me at this point -- where they would have all of the car prices -- we would have all the car prices in a computer and each one of our brokers, whether it be in an office or gas station or wherever he was, he could give a quote on a new car by pushing certain codes on this -- the name escapes me, whatever it is, the unit, it was a small thing, and they would charge $3 for the quote. We would receive $1 of the $3 which would cover the overhead of the entire system.

Q Mr. Maiorana, at all times from the beginning to the end, did Nabcor make an attempt to engage in the business of selling automobiles?

A Absolutely yes.

Q During the period from the end of 1966 to the public offering what was your salary per year from Nabcor?

A Approximately $15,000.

Q Did it change at all?

A When? When we went public?

Q Yes.

A Yes. I was drawing approximately $15,000 andthen it went to $20,000 when we went public.

Q Do you know a company named Capital Motors?

A Yes.

Q Did you ever have any discussions with Capital Motors concerning employment?

A Yes.

MR. KLEINBARD: When?

Q When did this occur?

A 1966.

Q When in '66?

A In the spring of '66.

Q What was Capital Motors?

A It was a Chevrolet dealership. However, I was talking to the chairman of the board of that, or the owner, and the chairman of the board of Resolute Insurance Company.

T4

THE COURT: You were talking about employment. In what capacity, manager or salesman or what?

THE WITNESS: A representative of the insurance company, going to guarantee me $50,000 a year --

THE COURT: Please, I just asked you what capacity would you be there, insurance salesman or what?

THE WITNESS: A director of sales in Eastern Pennsylvania, New Jersey.

THE COURT: For whom?

THE WITNESS: Resolute Insurance Company.

THE COURT: I don't think that is comparable and I will strike the answer, whatever it was.

Q You mentioned lawsuits before. You mentioned a dozen or so lawsuits.

Can you recall on what basis these lawsuits arose?

MR. KLEINBARD: I object.

THE COURT: Is this going to be the entire dozen?

MR. PERSON: I would like to explore the lawsuits.

THE COURT: You are going to do it by the entire dozen or one by one?

MR.KLEINBARD: Your Honor, I think the pleadings in the lawsuits are the best evidence rather than this witness's testimony about it. I don't see what relevance it has.

THE COURT: He is trying to anticipate.

MR. KLEINBARD: I don't think that is proper.

THE COURT: Mr. Person, very seriously, if you have a claim of a lawsuit in which there was some economic loss --

MR. PERSON: We do.

THE COURT: Resulting from the alleged claim, you may go into it in some proper fashion, of course.

BY MR. PERSON:

Q Can you identify the lawsuit, where the lawsuit arose subsequent to any of the activities complained about in this lawsuit?

A Yes.

MR. KLEINBARD: Your Honor, again it is much too vague.

THE COURT: Just to make a start. Let's see where it goes.

Q Can you identify one of such lawsuits?

A Arctic Motors, Mr. Ippolito sued.

Q When did that lawsuit develop? When was it filed?

A Filed some time in 1967, I believe.

Q Do you recall what the claims were?

MR. KLEINBARD: Your Honor --

MR. PERSON: Does Mr. Kleinbard have a copy of the complaint? Maybe he can assist us.

MR. KLEINBARD: I am objecting on the ground that the pleadings are the best evidence and obviously this plaintiff has the pleadings and I don't see why we have to have his recollection. We had his recollection today on all kinds and varieties of matters.

THE COURT: But you are all familiar with what the pleadings were?

MR. KAPLAN: Your Honor, we asked for the pleadings in discovery in 1971 and they have never been produced.

THE COURT: Do you have the pleadings?

MR. PERSON: If I didn't produce them I don't have them, your Honor.

2 MR. KAPLAN: Our information is that some of these are in the custody of the law firm in Trenton and in all these years they have never gotten them.

THE COURT: The objection is that the best evidence would be the pleadings. If the evidence is not here I will overrule that particular objection.

Q Did the defense of that lawsuit cost any money?

A Yes.

MR. KLEINBARD: I object on the ground of relevance, your Honor. We don't know who is right and who is wrong. Supposing Nabcor was wrong?

THE COURT: I do think I have to have the lawyers come up here just a minute.

(At the side bar.)

THE COURT: Look, as far as lawsuits are concerned, if the pleadings are unavailable and if you are talking about the best evidence objection, then I don't know that that stands up.

But as far as relevance, lawsuits may relate to a lot of things.

MR. KLEINBARD: Supposing, as we believe to be the case, Nabcor was sued for fraud and they had to expend money to defend that thing and lost? I dont believe that is chargeable to anybody under any circumstances. There were suits. I don't know if this was one of them or not.

THE COURT: Let's suppose the lawsuit was for fraud, claiming there were misrepresentations made at the outset. I don't assume, very quickly, that that can be chargeable to General Motors. But if the lawsuit is for a breach of contract, failure to deliver cars, that might be another matter.

But the mere existence of a lawsuit without a pretty careful showing is just not relevant to this action.

Do you have any lawsuits that you can demonstrate to me are relevant to this action in some specific way?

MR. PERSON: To expedite matters, I would like to reserve that until Mr. Kleinbard raises the issue.

THE COURT: It is not a matter of reserving. You complete -- I get your point. You are not on your own accord now seeking to bring it out as an element of damages, right?

MR.PERSON: It is not that important to us.

THE COURT: So as far as your direct examination you are not bringing it out? All right, fine.

(In open court.)

THE COURT: Anything else?

MR. PERSON: No further questions.

THE COURT: All right, cross-examine.

$87:CROSS EXAMINATION

BY MR. KLEINBARD:

Q Mr. Maiorana, earlier today you produced the payroll book for 1967. Do you have the payroll book for 1966 or does Mr. Person have it?

MR.PERSON: I am not sure what I produced earlier. When today? I didn't produce anything.

MR. KAPLAN: The payroll book for 1967 was produced previously. We would like the payroll book for 1966.

MR. KLEINBARD: The witness testified about 1966, but we only have the payroll book for 1967.

Do you have the payroll book for1966?

MR. PERSON: If you don't have a copy in your file, there arent copies.

THE COURT: I don't think that discovery requests should be made in court before the jury.

Q Mr. Maiorana, you testified on direct that subsequent to May 3, 1966, Nabcor telephone in orders for Cadillacs to Mr. Murray of Colonial Cadillac, is that right?

A Could you read the question again, please?

(Question read.)

A I believe I testified that I called in orders to Colonial Cadillac to Bob Murray.

Q And one of the features of the Nabcor System was that each customer of Nabcor's broker could order any kind or make of car to his specification, isn't that right?

A That's right.

Q I believe you testified, and I think you reaffirmed it just a minute ago, that you personally telephoned in the specifications to Mr. Murray for the majority of the Cadillacs that were ordered subsequent to May 3, 1966, is that right?

A Yes.

Q At pages 30007 and 30042, Plaintiffs' Exhibit 450, the log, lists some 43 orders placed by Nabcor with Colonial Cadillac?

A Can I have a copy of that?

MR. KLEINBARD: I am making that as a statement because that is in evidence.

Q These orders were given to Nabcor by the following Nabcor brokers, which I find listed in Plaintiffs' Exhibit 450:

Riccotelli, Simpson or SMC, Jones, Arctic Motors, Goldfeder, New York Auto Brokers, Schultz, Augustine Motors, Coastal Auto Brokers, F.A. Smith, Montclair Auto Brokers and Lou's Auto Mart.

Now, apart from Plaintiffs' Exhibit 276, which I believe is the locate Colonial Cadillac made available to Nabcor in the Spring of 1966, and the Goldsmith Cadillac which Colonial made available to Nabcor in 1973, did Colonial Cadillac make available any other Cadillacs to Nabcor?

THE COURT: We will have to take a short recess now, Mr. Kleinbard.

(Recess.)

(Jury in box)

(Record read)

A Yes.

Q Tell me how many and for whom?

A I will have to qualify that answer. He made Cadillacs available but not to the specific Cadillacs that were ordered.

Now I'll answer your question: It was near Christmas of 1966, two days before Christmas, that Arctic Motors had ordered a blue Cadillac which he was hounding me on. It should have been in and he was looking for delivery of that car. I called Bob Murray several times and Bob Murray said "Look, the only thing I can do for you, I would like to help you, but I just have not gotten the cars in and I expect them to come in, whatever, but I don't have the car. I gave my wife for Christmas a gray Cadillac Sedan DeVille which I can give to you in place of it. If the customer wants that one he can have that one."

But I called Ippolito --

Q In other words, you offered the gray Cadillac for the blue Cadillac? Is that where we are going?

A Yes, and they wanted the car they ordered.

THE COURT: Let me get oriented.

When you started your question you asked about the May 1966 transaction and then the 19 --

MR. KLEINBARD: With the exception of those two.

THE COURT: Those were the ones you were excepting?

MR. KLEINBARD: Yes.

THE COURT: Going back to you, Mr. Maiorana, do I understand that Mr. Murray offered to sell a gray Cadillac?

THE WITNESS: Yes.

THE COURT: And then what happened?

Mr. Kleinbard, take over.

BY MR. KLEINBARD:

Q Were there any other Cadillacs which were made available to Nabcor?

THE COURT: Before we get to that, the gray Cadillac was not acceptable to Arctic's customer?

THE WITNESS: I called Arctic and they wanted their specific car. It was a blue car.

THE COURT: My question was: Was it unacceptable?

THE WITNESS: Yes, it was.

I'm sorry.

Q Were there any other Cadillacs, as long as we are on that subject, which Colonial Cadillac made available to Nabcor?

A Yes. There was one other that I can recall. Joe Bente had a customer that had ordered a black four-door Cadillac and the car was not in and this was sometime in January of 1967, the first week or so, a couple of weeks, and his customer was going to cancel, and he was going to lose all of his other customers.

I called Bob Murray and said "Please see what is happening to this car."

He said "I don't have it. The only thing I have that I can give you is a black four-door Fleetwood Brougham which was $2000 more than the car which Joe Bente had ordered, a lot of extra equipment -- it was a bigger car.

Q The customer wanted it or he didn't want it? Did he accept the car?

A He wanted the car he ordered.

Q Your answer is that he did not accept that car?

A He did not, no.

Q Did Nabcor dispose of these two Cadillacs which you have thus testified about to other customers?

A I don't say that Nabcor purchased those cars.

Q Did Nabcor purchase the gray Cadillac and the black Fleetwood that you have just testified to?

A No. They were made available to me if these customers were willing to accept them. We didn't purchase them.

Q Apart from these two that you have --

THE COURT: Did we get a date on the Bente transaction?

THE WITNESS: Yes, your Honor.

MR. KLEINBARD: January '67, your Honor.

THE WITNESS: The first week or two.

THE COURT: Proceed.

Q Are there any other Cadillacs you want to add that Colonial Cadillac made available to Nabcor?

A That's all I can recall at this time.

Q You testified earlier today about a broker by the name of Attainment. You associated that with a Mr. Tedesco. Did you mean to refer to Mr. Tedesco in connection with Attainment?

A I don't know the meaning of your question. I would like to have read back the whole thing.

(Record read)

A These were two separate situations. I don't know what you mean, Mr. Kleinbard. Clarify your question and I'll be glad to answer it.

Q Isn't it a fact that Mr. Tedesco was associated with a brokerage that did business under the name of Augustine Motors Brokerage House?

A Yes, he did.

Q Are you certain that no Cadillacs were made available to Nabcor to fill the orders placed with Nabcor by Augustine Motors Brokerage Company or Mr. Tedesco?

A I thought we were on the subject of Attainment. I don't think we concluded that. I would like to have the opportunity to answer it.

THE COURT: Mr. Kleinbard is asking you about Tedesco.

A Tedesco purchased Attainment -- he purchased that brokerage.

Q I'm asking you whether Nabcor obtained any of the Cadillacs which it ordered from Colonial or

Augustine Brokerage Company, whichyou said a minute ago was George Tedesco.

A We didn't receive any of the Cadillacs that were ordered by Tedesco from Colonial Cadillac.

Q I believe you testified earlier that Mr. Ippolito was the individual who did business under the name of Arctic Motors?

A Yes.

Q Other than that one Cadillac which you referred to, he didn't receive any of the Cadillacs that Nabcor had ordered for him through Colonial? No Cadillacs were made available for him through Nabcor other than the ones to which you testified a few moments ago, the gray Cadillac?

A Yes.

Q There has been reference to a litigation between Mr. Ippolito and yourself. There was such a litigation, was there not, Mr. Maiorana?

A Yes.

T6

Q And I would like to read from your deposition in that action, which was pending in the Superior Court of New Jersey, taken on April 15, 1971:

"Q Are you presently dealing with Colonial Cadillac?

"A No.

"Q In relation to your business?

"A No.

"Q When did you last deal with Colonial Cadillac?

"A I believe it was in 1967, the latter part, possibly.

"Q And you said Colonial Cadillac delivered vehicles to you as per Mr. Ippolito's orders?

"A He made them available to me and I made them available to Mr. Ippolito.

"Q Did Mr. Ippolito accept them?

"A No.

"Q I show you D-5 for identification, being a contract dated September 2, 1966, for a 1967 Cadillac De Ville. I ask you if you were able to secure that vehicle for delivery to Mr.Ippolito?

"A I believe this car came in after Mr.Ippolito and I believe this was offered to him. He said his customer had cancelled or something.

"Q Then your testimony is that you were able to secure that vehicle?

"A Uh huh."

Page 39:

"Q From whom?

"A From Colonial Cadillac.

"Q Colonial Cadillac had a car ready for you?

"A Yes.

"Q Do you remember in what month that vehicle was made available to Mr. Ippolito?

"A About in December,January, some time in there.

"Q December or January?

"A Yes, I don't recall exactly.

"Q Now, I show you D-6 for identification and ask you if the vehicle that is described in that purchase order was ever made available to Mr. Ippolito?

"A I am not sure whether this specific color or combination of equipment was, but certain Cadillacs did come in. Sometimes a car comes in and comes in on a specific order. But sometimes equipment isn't exactly as ordered and it is offered to us. This happens in the automobile business. It might have happened in this particular case.

"We were called, these cars were made available to us on specific orders and I would say he was offered an automobile which would either be this one or a replacement of this one.

"Q My question is the vehicle described in D-6.

"A I am not sure.

"Q You don't know?

"A No.

"Q It was through what agency that you secured it?

"A Colonial Cadillac.

"Q Again Colonial?

"A Uh huh.

"Q hat month?

"A I would say some time after the 1st of the year.

"Q After January of 1967?

"A Yes.

"Q I now show you D-7 for identification, and ask you if that vehicle was delivered or made available to Mr. Ippolito?

"A This one, yes, very definitely.

"Q You recall that one?

"A Yes, I do.

"Q What month was it made available to Mr. Ippolito?

"A I am sure this one was in the month of December, 1966.

"Q Did it come from the Colonial Agency?

"A Yes, it did.

"Q Who contacted Mr. Ippolito with regard to this availability?

"A I did.

"Q You spoke to him yourself?

"A Yes."

Page 42:

"Q I show you D-8 for identification and ask you the same question, whether you were able to secure that vehicle and make it available to Mr. Ippolito?

"A Yes, again around the same time.

"Q That is December?

"A Some time in that period.

"Q That was also through Colonial Cadillac?

A Yes.

"Q Who spoke to Mr. Ippolito at that time, at the time this was made available to him?

"A I don't recall who it was that spoke to him.

"Q Was it you?

"A It might have been."

Page 56:

"Q Well, after these orders that Mr. Ippolito placed for Cadillacs were filled, you made those vehicles available to him?

"A Oh, yes."

I would like to read just two or three other sentences, page 36:

"Q How were these orders placed with Colonial Cadillac, verbally or in writing?

"A They were generally phoned in.

"Q Phoned in?

"A Uh huh.

"Q Do you have any records of the time,that is, the date that the telephone orders were made?

"A I don't know whether I would or would not.

"Q Who made those telephone orders?

"A I don't know at this point. It may have been Mr.Nash or someone else or Mr. Gallagher in the office or other individuals that may have made it at that time."

On your direct you gave a list of brokers, Mr. Maiorana, who terminated or who you claim terminated in March or April, 1967.

A I would like to comment on your last

discussion. There were other cars --

MR. KLEINBARD: Your Honor, there is no question pending.

THE COURT: There is none.

Q I was saying, Mr. Maiorana, that on your direct you gave a list of brokers whom you claim terminated in March or April of 1967 and you included in that list Attainment, Midland Management, Goldfeder, Riccotelli, Chuck Cohen, Vanderzee and Vandermar among others.

Do you have any written cancellations from any of these brokers that I have just named?

A Those cancellations generally were not in writing.

Q Do you have any of the brokers I just listed?

A List them again.

(Record read.)

A No, I believe I have discussed that Attainment was sold --

Q The question was simple, do you have any written cancellations from any of those brokers just listed to you by the reporter,yes or no?

A If there were any written cancellations they were turned over with all the rest of the documents to your office, Mr.Kleinbard.

Q If I tell you I received no written cancellations for those brokers --

A Then we don't have any.

Q You didn't receive any, is that correct?

A Not in writing.

Q Now, you were asked in the first set of interrogatories which we posed to you on June 11, 1971, the following question, the fifth question:

"State whether any Nabcor franchisee has sought to cancel, terminate or rescind its Nabcor franchise agreement or to obtain the return of any consideration paid therefor by any means including without limitation the lawsuits referred to, and if so, identify

"(a) Each such franchisee."

And I would point out that without listing the entire answer, ladies and gentlemen of the jury and the Court, that in the supplemental answers to this first set of interrogatories verified by Mr. Maiorana on August 9, 1972, there was omitted from this answer the following brokers mentioned this morning on direct examination:

Attainment, Todesco, Midland Management, Goldfeder, Riccotelli, Alf-Lex, Chuck Cohen, Vanderzee and Vandermar.

Mention of Chuck Cohen, Mr. Maiorana, reminds me, did he do business under the name of Tallman Motors?

A I believe so. I have to check my records. That sounds like it would be Tallman Motors.

Q I believe you testified that after he was unable to fill the orders he placed with Nabcor he ceased being a Nabcor broker and went to work for Nabcor, is that correct?

A Yes.

MR. KLEINBARD: I have compiled, your Honor, from Plaintiffs' Exhibit 450 a series of exhibits I would like to offer -- I don't have to offer them, 450 is already in evidence.

I would just state the fact that the only orders placed by Mr. Cohen doing business as Tallman Motors was a Chrysler which he ordered or at least Nabcor's log indicates that an order was received on 1/18/67.

There are no GM cars ordered as reflected in the log.

THE COURT: Are there any GM cars ordered by Cohen as Cohen?

MR. KLEINBARD: No.

THE COURT: And Cohen doing business as

Tallman?

MR. KLEINBARD: Doing business as Tallman Motors, your Honor, is the same thing.

Q I believe when you listed the brokers who terminated in March or April of 1967, you included Goldfeder.

Plaintiffs' Exhibit 450 reveals that Nabcor continued to do business with Goldfeder on 9/22/67, which is some months after March or April, 1967.

On February 22, 1968, and on --

THE COURT: When you say doing business, it indicates orders were made and delivered or what?

MR. KLEINBARD: Well, as I see the first one, your Honor, 9/22/67 for a 1968 Chevrolet and the log indicates no disposition whatever of any kind.

The second, February 22, 1968, is for a 1968 Buick and the log indicates delivery.

5/23/69, more than two years later, a Buick, 1969, was ordered and documents other than in the log reflect that it was delivered by Bano Buick.

pgr1 F.Maiorana-cross

Q Vandermark was another one of the brokers who was said to have terminated this business with Nabcor in March or April of 677. Vandermark, Mr. Maiorana, did business under the name of Eastern Automotive Exchange.

A If that's what the log shows, yes. He was in Newburgh, New York.

MR. KLEINBARD: The log shows that there was a Buick ordered from Bano Buick on 12/19/67, a '68 Buick. The log indicates delivery.

Then on March 13, 1968, a 1968 Chevrolet was ordered, and documents other than the log reflect delivery by Rohrer.

On March 13, 1968 a '68 Chevrolet was ordered from Rohrer and delivered, according to the log.

Tedesco, who did business under Augustine Motor Cars Brokerage, another one of the brokers listed as having terminated in March or April of '67 continued to do business from 5/5/67 through 5/15/1969, that is, continued to place orders.

If your Honor wishes, I will read the disposition of each one of those cars.

MR. PERSON: I wish he would. When he says "continued" he should point out whatever long gaps there are in each case.

MR. KLEINBARD: Yes. I have done so so far and I'll continue to do so.

On May 5, '67 a '67 Chevrolet is shown as ordered, but there is no indication -- the log reflects no order to the dealer.

So the same day a Pontiac '67 order was received by Nabcor and the log reflects no disposition of any kind.

On May 31, 1967, a '67 Pontiac was ordered and the log reflects a cancellation.

There is a similar entry for the same date with respect to another Pontiac, '67, again reflecting a cancellation.

On May 16, 1968, a 1968 Buick was ordered and the log indicates that it was delivered.

On June 4, 1968, a 1968 Chevrolet was ordered and the log indicates that it was delivered.

On October 23, 1968, a Pontiac, a 1969 Pontiac, was ordered, and the log indicates that it was delivered.

On October 24, 1968, a 1969 Buick was ordered, and the log indicates that it was delivered.

On November 6, 1968 a '69 Buick was ordered, and the log indicates delivery.

Again on November 6 another Buick, a '69 Buick, was ordered, and the log indicates delivery.

On 11/6/68 another '69 Buick was ordered, and the log indicates delivery.

On 11/1/68 the log indicates the order of a '69 Cadillac, and it was delivered.

On November 27, '68, a '69 Buick was ordered and delivered.

On March 13, 1969 a '69 Chevrolet was ordered and delivered.

On March 13, 1969, another '69 Chevrolet was ordered and delivered.

On April 30, 1969, a '69 Pontiac was ordered, and documents other than in the log reflect delivery.

Finally, May 15, '69, the last Pontiac order, the log reflects no disposition of that order.

THE COURT: There was a reference to two names in relation to Tedesco, Augustine and this Attainment. I'm not clear whether --

MR. KLEINBARD: Prior to the witness' testimony I had not heard of Attainment. I had only heard --

THE COURT: Are these documents in the name of Tedesco or Augustine?

MR. KLEINBARD: It says Augustine Motors, George Tedesco.

THE COURT: Was Tedesco doing business with Nabcor as Augustine?

THE WITNESS: Augustine, yes. He purchased the franchise. The original franchise was to Attainment.

THE COURT: You mean the original franchise when?

THE WITNESS: That was I believe in February or March of '66. Allen Dennison --

THE COURT: When did it become Augustine?

THE WITNESS: Sometime later, your Honor.

THE COURT: Was it the same company but just a change of name?

THE WITNESS: No. It was not the same company. Allen Dennison came to work for us; he sold his franchise to Tedesco.

THE COURT: That franchise was --

THE WITNESS: Attainment owned by Tedesco.

THE COURT: This was early in '66?

THE WITNESS: It was in '66, yes. Maybe

the summer of '66.

THE COURT: I'm not clear.

When did Tedesco start up?

THE WITNESS: In 1966. Attainment was before him, preceded him, by about four months.

THE COURT: Going chronologically, Attainment started out in '66?

THE WITNESS: Yes.

THE COURT: And was owned by this Dennison?

THE WITNESS: Allen Dennison, yes.

THE COURT: And four months later, still in '66, Dennison sold his franchise to Tedesco?

THE WITNESS: Yes.

THE COURT: And then under what name did Tedesco do business?

THE WITNESS: Under his own name, Tedesco or Augustine.

THE COURT: Tedesco didn't have two franchises. He had one franchise which he bought from Dennison?

THEWINTESS: Yes.

THE COURT: So after that point it's Augustine, carried out by Tedesco?

THE WITNESS: Right.

BY MR. KLEINBARD:

Q You testified on direct that you were familiar with the financial situation of Nabcor in late '66 and early '67, correct?

A I believe I did, if that's what the record shows.

Q You also testified regarding certain things you claimed happened to your business in that period, late '66, early '67, right?

A Yes.

MR. KLEINBARD: I would like to direct the jury's attention and the Court's attention to Defendants' Exhibit LLL, which is in evidence, and I will read therefrom the figures for franchise income, either $1500 or $1590 -- it's a poor copy -- and automobile sales, 200 --

THE COURT: What is LLL?

MR. KLEINBARD: It's a financial statement for the year ended January 31, 1967, the fiscal year.

It reflects franchise income of, I believe, $1500 and automobile sales of $261,613 and some cents.

THE COURT: Proceed.

MR. KLEINBARD: On Defendants' Exhibit F6, which is the offering circular, which I think everybody by now is familiar with, I would like to read from page 24 the results for the fiscal year ended January 31, 1968, which follows the events testified to by Mr. Maiorana.

THE COURT: What page?

MR. KLEINBARD: Automobile sales, 567,219; franchise income 126,857.

That particular year saw the selling, generally, and administrative expenses at $117,908.

Since there has been some reference to selling, general, and administrative expenses I will read the figures for the succeeding years which appear in the offering circular.

For the fiscal ending 1969, they were 104,690; for the fiscal year ending January 31, 1970, they were 109,595;and for the year 1971 they were 96,212.

Obviously this was a descending selling, general, and administrative expense picture.

From a profit point of view the net income in 1968 actually was a loss of $10,659; for the fiscal year ending 1969 there was a net income of 43,929; for the fiscal year ending January 31, 1970, a net income of 52,768; and for 1971 a net income of 104,443.

MR. PERSON: May I ask for a correction. He said the first year was income and it reflects loss.

THE COURT: He said a loss.

What was your last figure?

MR. KLEINBARD: 104,000.

THE COURT: For what year?

MR. KLEINBARD: For the fiscal year ending January 31, 1971, 104,443.

There was also some testimony by Mr. Maiorana as to the purposes for which the proceeds of this public offering were going to be devoted. I'm reading, application of proceeds:

The net proceeds to be realized by the company after deduction of estimated expenses of the offering will range up to an estimated maximum of $240,000, depending on the number of shares and debentures actually sold. The company intends to use the net proceeds during the one-year period after this offering in the following order and priority:

On the assumption the issue was entirely sold $25,000 was going to be devoted to marketing employees and expenses; $10,000 to sales training and prmotional employees; 25,000 to advertising; 20,000 to sales, training, and promotion equipment; 15,000 to debt service on the debentures, and 50,000 to the expenses of the antitrust litigation, which is this lawsuit, and $95,000 for working capital.

THE COURT: I would like to recess.

Is there anything else?

MR. KLEINBARD: I have some more questions, but it won't take too long.

THE COURT: How long would you be?

MR. KLEINBARD: Your Honor, I have not had a chance to look at this afternoon's transcript --

THE COURT: Would you rather go over to Monday?

MR. KLEINBARD: If I may. I won't be very long. I'm sure it will be less than a half hour.

THE COURT: We will adjourn now until Monday morning at 10, ladies and gentlemen, and I'll talk to the lawyers for a moment.

(Jury out)

THE COURT: Next week, the witness after Mr. Maiorana, what do you plan to do then?

MR. PERSON: What I propose to do is to have these three depositions put in in the way we discussed, if I can.

Also, the statistics. I'm not sure what we can do but I want to offer the statistics, and I suppose we should try to reach some type of agreement. I will offer them and let them object otherwise.

THE COURT: We have a batch of things you turned in today which I understand are not acquiesced in by the defense counsel.

When did you get these things up?

MR. PERSON: Pursuant to your direction, last night, your Honor.

MR. KAPLAN: May I be heard on that?

THE COURT: Yes.

MR. KAPLAN: The 260-odd sheets of paper which Mr. Person has just handed me purport now to be instances in which the plaintiffs claim there were delays in delivery as a result of some sort of violation of law they complain of in this case.

It is our position that these were not submitted in compliance with your order; that plaintiffs' counsel previously represented that the 90 or 90-odd sheets that had been furnished on by

Monday were the sum total of it.

THE COURT: What is the reference on that?

MR. KAPLAN: Pages 2656 and 2657, starting at line 17. The three references are to be taken together.

THE COURT: What is the next reference?

MR. KAPLAN: 2911 and 2912, starting at line 18.

THE COURT: What does it say?

MR. KAPLAN: The 2656 reference, that's where your Honor asked Mr. Person to give all of his writeups and I'll quote your Honor's request:

As I understand it, what you are proposing to do was to give me writeups of situations where you claim there was a refusal to deal or some other problem like delay.

And Mr. Person said:

"I have not counted how much in each batch but I believe by Monday I should have probably around 100, and right now I probably have around, I guess, 70 or 80."

That was on November 18.

Then at page 2911, which is in the transcript for November 19, the following day, Mr. Kleinbard asked whether the sheets Mr. Person had tendered to us at that point were all there were, and Mr. Person responded that there would be more and that we would have the rest on Monday.

You then asked Mr. Person: You will have your complete writeup first thing Monday; is that right?

And Mr. Person responded "Correct."

And then the first thing Monday, November 22, at page 2925 you asked:

Mr. Person handed me a batch of forms filled out. What does this represent?

THE COURT: What are you reading from?

MR. KAPLAN: 2925.

And Mr. Person answered:

These represent the transactions which we complained about, that is, essentially the cancelled automobiles resulting in loss to the Nabcor system.

Now I think, first of all, the record could not be clearer as to the representation, but passing that I think two other observations need to be made.

The first observation is that this claim of delay is a last-minute claim. It is not in the complaint nor do I believe it is anywhere else in this trial. Until Mr. Person was presented with the computer printout which we tendered to the Court pursuant to your instruction and over our objection. One of the reasons for the objection was the fear that precisely what has transpired here would happen, that is, Mr. Person with the benefit of that printout has invented a whole new part of the complaint. Instead of 100 complaints he talked about we now have 360, 260 of which he stored up since Monday on a claim which was not in the complaint or anyplace else until he had the computer printouts. We object to it. It does not belong in the case.

T8

THE COURT: Well, didn't we go through it? We let the jury go early one day. There was a time when I was trying to go through and find out what these plaintiffs' sheets in 799 for identification meant and what day was that?

MR. KAPLAN: It was Monday afternoon, your Honor.

THE COURT: It seems to me that the record will say what it says, but we let the jury go early and we did so, so I could come to grips with this statistical material and it seems to me during the course of the day Monday,and I don't know whether we started at noon and resumed later on or what exactly happened, but it seems to me that at some point we started to go through the Chevrolet and I think we went through all the Chevrolet transactions.

Then we went through some other things to illustrate the type of points being made, and I recall quite vividly, although I don't know the record reference offhand, that there were several instances where the claim was made about delay. There was a dealer by the name of Kline --

MR. KLEINBARD: Page 3092, your Honor.

THE COURT: Now, wasn't that Monday?

rp2

MR. KAPLAN: Yes, your Honor.

MR. PERSON: Your Honor, may I --

THE COURT: Just a minute. I think what has happened is that I was told and I think the record reflects and certain my memory is most vivid, that I was asking about this material over a period of days. I wasasking all counsel.

I asked about it well over a week ago. I think it was probably Friday -- Thursday, the 18th, I think --

MR,KLEINBARD: There was a discussion on that date.

THE COURT: But, anyway, over a substantial period of time I have been asking for this material and the record reflects what it reflects.

I kept receiving word that it was in the process and both sides -- and then we had a session when I was told last week, I believe, that General Motors had its materials,it arrived and Mr. Kleinbard was going to look at it that night --

MR.KAPLAN: Last Wednesday.

THE COURT: Then I was really trying to get both sides to produce these materials to have definitive claims.

rp3

I also recall quite vividly the objections of Mr. Kleinbard coming forward in advance of his case and my adamant refusal to listen to that objection.

Now, I must say,and it has occurred to me independently of any statement --

MR. PERSON: Could I, your Honor --

THE COURT: Just a minute. I will hear you, but I have heard a lot.

MR.PERSON: I would like to influence your thinking.

THE COURT: I think the problem has materialized that was predicted by Mr. Kleinbard. I don't have any doubt that it has materialized and I realize now in retrospect that the production of the General Motors material was, under the circumstances of this case, it had advantages and it has had disadvantages.

Because it is true that when the specifics are brought to light in this case, we have repeatedly seen adjustments of theories and there are very, very serious questions of credibility and when there is such questions of credibility, there is good reason for withholding all possible material.

But it hasn't been withheld, it has been produced.

MR. PERSON: It hasn't been produced.

THE COURT: I am going to finish my statement.

We have had the discussion on Monday. I thought I had in my hands the definitive materials from both sides and I adjourned this jury at about 3 o'clock so we could spend the rest of the day going over them, and I didn't do that in order to play around and there wasn't one word about any additional materials until thismorning and the inferences are plain for anybody of even high school intelligence, that this is a strategy to take care of the inevitable strength of the statistical materials of General Motors. I view it in that light.

MR. PERSON: I would like to make an offer of proof. I object to these continual, I mean I am trying to prove my case and already you decide all the credibility --

THE COURT: Just don't generalize, address yourself to this point. You showme the reference in the record.

MR. PERSON: I would like the record, and I remind you and Mr. Kleinbard and Mr. Kaplan that the original purpose that you yourself stated was to get all the facts out and Mr. Kleinbard had agreed that his

rp5

production was going to be highly specifically detailed production of information, and I was waiting because I could take advantage of that.

What in fact came out was contrary to what he represented to you, the Court, that he was going to produce. He in fact did not produce --

THE COURT: That is his production. How about yours?

MR. PERSON: My whole representation, and the record is very clear, that my representation was cancellations and I said I would undertake that. I can't undertake the other and --

THE COURT: Where do you tell me that? That you are deferring the delay point? You find it in the record.

MR. PERSON: Wait a minute. Let me offer this, 361.

THE COURT: I will lend you the record over the weekend again for further work on this point.

MR. PERSON: I do not feel Mr. Kleinbard -- the purpose I was waiting for his statistics, I was waiting for them in good faith, in reliance upon what you and Mr. Kleinbard and I agreed he would produce, but he did not. Now you are holding that against me.

rp6

THE COURT: That is besides the point. I wanted you to --

MR.PERSON: Let me show you the statistics.

THE COURT: You review the record and I want you to point out where you reserved until today the delay point. The whole 26 or 27 volumes are available for you to look at and point that out.

MR.PERSON: I would like to show you this Exhibit 361. I was compiling this before Mr. Kleinbard was doing any compiling, and it is right in there and I have a column Ruckel Pontiac, which I was going to rely on and I offered that to the Court and it was rejected, and the same thing for Rohrer Chevrolet, the same column pointing to that. Mr. Kleinbard led me to believe that this was going to be produced, and I waited for them.

2

THE COURT: Find it in the record. The record is available for you. Take the entire weekend and get it in the record.

MR.PERSON: I am really tired of these --

THE COURT: You have no reason to be tired about anything.

MR. PERSON: All I am seeking is fairness and I am not getting it. You and Mr. Kleinbard are coming against me, and all I want is just fairness here.

rp7

I want to present my client's case. We have that as part of our claim and I tried to represent that. I have had documents predating Mr. Kleinbard's and Mr. Kleinbard's documents are worthless.

I can offer right now statistics that are better than his documents and upon which I can rely if you want me to offer that right this minute, because I have done a lot of work.

THE COURT: Do it.

MR.PERSON: That is what I was hoping you would ask. This is part of it, your Honor. This is my work product predating Mr. Kleinbard's. I have even gone over his mass of inaccuracies to try to help him correct it. Where is my corrections on his junk?

THE COURT: It does no good whatever to hand me what you say is your work product. If there are corrections to be made or distortions or anything else wrong with the Paul, Weiss material or the information isn't going to present it and -- how long have you had these materials?

MR. PERSON: I have prepared them a long time ago.

THE COURT: A long time must mean at least before Monday or the Monday before that, so I say to you, Mr.Person, I say to you what I have already said, that if there are inaccuracies or distortions in the Paul, Weiss material, you are to show the chapter and verse in whatever form it exists, whether your work sheets or documents or whatever, to Paul, Weiss.

If they obstinately refuse to correct inaccuracies that exist, then I want to know about it.

It goes without saying I want to know about it, but it isn't a matter of throwing at me a lot of your work papers. It is a matter going to Paul, Weiss and facing them with this and seeing if they will correct. If they are obstinate, blind, dishonest and so forth, then I am sure you will let me know.

But I haven't heard anything so far except being thrown a lot of papers.

MR. PERSON: I would like to compare --

THE COURT: You should have shown it to the other side, so I can't do anything about it.

MR. PERSON: My credibility has been raised, the issue of credibility about what I was doing is raised many times in this case, your Honor, many, many times. I am getting tired of it.

I can make an offer of proof right now, I have people in court who prepared these, who I could put

rp9

on the witness stand to ask what they did and when --

THE COURT: I would suggest that you mark those for identification and doing what I told you to do days ago. That is to take your primary remedy and to go to the other side.

MR. PERSON: All I am saying, your Honor, is that I was led --

THE COURT: I am saying to do this. Mark those for identification and go to the other side.

My number is on the phonebook. If over the weekend you find that Paul, Weiss is unreasonable with you about any matter or they are unreasonably willing to confer with you at any recess or any evening, I am available.

MR. PERSON: Your Honor, that is the reason --

THE COURT: I am one of the judges who is in the Telephone Book.

MR. PERSON: I understand that, your Honor. I only want you to realize that --

THE COURT: My office staff is in the Telephone Book.

MR. PERSON: I have examined it and produced all these statistics and I have them all here. I was waiting --

THE COURT: Why weren't they produced?

MR. PERSON: Because you and I and Mr. Kleinbard and others agreed that General Motors was going to produce a lot of statistics here and what they produced is nothing.

THE COURT: I say to you right now that, and do I have to repeat this for the fifteenth time? Find those things in the record and mark those for identification, and I want you to get together with Paul, Weiss immediately, Thanksgiving or no Thanksgiving, and arrange to work with Paul, Weiss between now and Monday on all the subjects you want to work with them on.

If they are unwilling, come in Monday morning and tell me about their unwillingness to work with you.

I want those marked for identification.

MR. PERSON: All right. I have others to add that are scattered throughout the boxes and I will collect them all.

THE COURT: Get them together.

MR. PERSON: I was trying to make sure that the issue of whether I had represented to the Court --

THE COURT: Another thing, I said it before two or three times and I offer you the entire record of this case where you can show me any relevant reference on this point and you can show me where you reserved until today the production of your documents which claim delay. That is all in the record, it is in the cold record, and you can get it and show me.

MR.PERSON: I did not claim that I held back saying that I am going to reserve the right to show the delays. I was waiting.

THE COURT: Mr. Person, I am telling you that all that I said in this entire procedure is down in black and white and it is available for you to make any arguments you wish to make,and it will be at your disposal and can be carried away by you between now and Monday.

MR. PERSON: Thank you, your Honor.

THE COURT: Mark those for identification, everything you want marked.

Mark those for identification, and then I have another hearing.

MR,KLEINBARD: Your Honor, may I just say since everything has been on the record, I don't mean by my silence to have it construed as acquiescing in what Mr. Person has said about me or my representations.

(Adjourned to November 29, 1976, at 10.00 A.M.)